

COMMISSION ON THE VERGE OF A JURISDICTIONAL BREAKDOWN: THE FCC AND ITS QUEST TO REGULATE ADVERTISING

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I. INTRODUCTION

The Federal Communications Commission's ("FCC" or the "Commission") purpose is to advance the interests of the American people in the sphere of communications. In striving to achieve

that goal, commissioners generally develop distinct regulatory philosophies to guide their consideration of agency proposals. Our regulatory philosophy is grounded in some basic "first principles."¹

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The authors would also like to express their tremendous gratitude to David Weitzel. Mr. Weitzel served as a legal intern in the office and devoted substantial energies to this article. His insights and hard work were invaluable. Additionally, legal interns Heather Walker and Gardner Foster brought

their considerable editing skills to bear in assisting with the completion of this article. Finally, the authors appreciate the sharp intellect and editorial support of Dan Troy of Wiley, Rein, & Fielding.

¹ These principles have been developed and refined over time. See Harold Furchtgott-Roth, *Regulation and Technology*, Remarks Before the New York Chapter of the Federal Communications Bar Association (visited Apr. 4, 2000) <www.fcc.gov/Speeches/Furchtgott_Roth/sphfr906.html>; see also Harold Furchtgott-Roth, *Regulation in the 21st Century*, Remarks Before KMB Video Conference (visited Apr. 4, 2000) <www.fcc.gov/Speeches/Furchtgott_Roth/sphfr905.html>; American Enterprise Institute, *The Realpolitik of Regulation: Offensive and Defensive Strategies* (visited May 21, 2000) <www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr005.html>.

First and foremost, a government agency such as the FCC is obligated to follow the law as written. Absent adherence to this fundamental idea, agencies lose the very core of their credibility and authority. Proposed actions largely fall within one of four categories under the “follow the law” principle. First, there are actions that are clearly mandated by the Communications Act of 1934² and the Telecommunications Act of 1996³ (collectively the “Act”). For these actions, the Commission has very little burden to demonstrate the efficacy of its action. Congress has required us to act. Second, there are cases where Congress has granted the FCC authority to act, but action is not mandatory.⁴ In these cases, the Commission must show its actions are reasonable. In the third category are proposed actions that have no clear foundation in the Act. Essentially the statutes are silent. For these cases, the agency faces a significant burden to justify any action. The Commission should be extremely reluctant to support policy initiatives in the face of statutory silence. Finally, in the fourth category are actions that a statute forbids.⁵ Obviously, agency action in these cases is barred.

Where a proposed agency action falls within the first of these categories, other factors become relevant.⁶ The first group of questions to consider is largely procedural: has the agency acted in a transparent and accountable way? What is the nature of the record that supports government intervention? Will aggrieved parties have an opportunity to take us to court to ensure that the agency has adhered to the law?

Aside from these procedural concerns, the Commission should also examine at a macro level whether regulatory intervention is necessary or desirable. The FCC should intervene only when other government agencies (federal, state or local) are inadequately addressing a problem. Basic

principles of federalism suggest that, in many cases, states and localities are better positioned to solve public policy problems.

Finally, the Commission must assess whether the regulatory resources spent on a given proposal could be more fruitfully deployed on other initiatives. Ultimately, the FCC’s resources are a zero-sum game. Resources taken for one proposal mean resources taken away from others.

Of course, these principles are easier to state in the abstract than they are to employ in Commission decision-making. Nonetheless, these principles should be brought to bear on FCC decisions. Absent such guideposts, the agency may stumble into policy arenas beyond its core competency and central mission.

Unfortunately, the Commission frequently strays from these principles.⁷ These forays are often motivated by the desire to reach out and “do good”—to solve every perceived problem that remotely affects telecommunications and social policies. This well-intentioned approach has unfortunate and unintentional consequences. The approach often disregards or aggressively and inappropriately interprets the law. It may adopt results-oriented procedures that deny parties viable legal recourse and thwart public participation. It often advocates FCC action even when another government entity or the marketplace is working to resolve the issue. Furthermore, these excursions draw resources away from functions clearly within the FCC’s mandate. Paradoxically the “do good” approach is often popularly received. New initiatives get quite a bit of positive media attention, as the government appears to be “solving problems.” Ultimately, this approach may undermine the core mission and the effectiveness of the agency itself.

Set out below is a case study of one Commission action indicative of the “do good” approach to

² See, e.g., 47 U.S.C. §§ 154(k), 157(b), 203, 204(a)(2)(A), 208(b), 209, 213(e), 215, 219(b), 220(a)(2), 224(b)(1), 225(b), 225(d), 227(b)(2), 227(c), 227(d)(2), 227(d)(3), 228(b), 228(c), 229 (a)–(c), 251(e)(1), 253(d), 254(a), 254(h)(2), 254(k), 255(b)(1), 256(b)(1), 257(a)–(c), 259(a)–(b), 260(b), 271(d)(3), 271(d)(6)(B), 275(b), 332(a), 332(c)(1)(C), 534(d)(2), 534(f), 534(g)(2); see also Communications Act of 1934, Title I, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–714).

³ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at scattered sections of 47 U.S.C.).

⁴ See, e.g., 47 U.S.C. §§ 213(a)–(c), 214(d), 218, 220(b), 302(a), 533(c), 549.

⁵ See, e.g., 47 U.S.C. §§ 210, 221(b), 224(c)(1), 302(c), 332(c)(3)(B)(7)(A).

⁶ This is by no means an exhaustive list. Rather, this article highlights those principles most relevant.

⁷ See Testimony of FCC Comm’r Furchtgott-Roth Before the House Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection, The Telecommunications Merger Review Act of 2000 (Mar. 14, 2000) <www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr004.html>; see also Harold Furchtgott-Roth, *The FCC Racket*, WALL ST. J. (Nov. 5, 1999) <www.fcc.gov/Speeches/Furchtgott_Roth/fccRack.html>.

FCC policy-making. We chose it not because it shows a particularly egregious misstep by the Commission, but somewhat the opposite. It shows that, although the Commission has no clear responsibility in certain areas, the desire to “do good” can push the agency to the edges of, and beyond, its jurisdictional authority. This inexorably leads to procedural short cuts, diminished efforts by other government agencies, and diversion of resources from more pressing and fundamental Commission activities. Thus, by attempting to “do good,” the agency may actually do harm.

The recent *Joint FCC/FTC Policy Statement For the Advertising of Dial-Around and Other Long-Distance Services To Consumers* (“*FCC/FTC Advertising Guidelines*” or “*Guidelines*”)⁸ is ultimately designed to protect consumers from allegedly misleading statements and improper disclosures embodied in certain advertisements for “dial-around” long-distance services. “Dial-around” services include “10-10-XXX,” which permits a customer to “dial around” the pre-selected long-distance service provider on a given telephone.⁹ The Commission staff and Federal Trade Commission (“FTC”) staff jointly developed the 18-page guidelines in an effort to determine which “dial-around” advertising approaches are permissible and which are considered misleading.¹⁰ The *FCC/FTC Advertising Guidelines* were released with much fanfare and positive publicity on March 1, 2000.¹¹

Generally speaking, the *Guidelines* establish basic principles that dial-around advertisers must follow (i.e. truthfulness, disclosure, clarity and conspicuousness) in an effort to put all carriers on equal footing with respect to advertising practices.¹² These principles are supported by detailed “factors” that the FCC considers in determining whether to bring an enforcement action against carriers who advertise in a “deceptive manner.”¹³ For example, in determining whether an ad is

“conspicuous,” the FCC considers the prominence of qualifying information, the proximity and placement of this information, the absence of distracting elements, and the clarity and understandability of the text of the disclosure.¹⁴

Commissioner Furchtgott-Roth dissented from the *FCC/FTC Advertising Guidelines* for several reasons, each of which is discussed in detail below.

First, by endorsing the *Guidelines*, the FCC failed to give proper weight to the “follow the law” principle. In situations where enabling statutes are silent regarding specific activities (the third category discussed above), an agency should be extremely reluctant to act. Because the Act is silent as to advertising regulation, parties advocating FCC action in this arena have a high burden to show that the proposed regulations are justified. Here, based on our analysis of the Act and reviewing courts’ interpretation of the statutory language, that burden has not been met. Second, the *Guidelines* should have been developed in a more open and transparent process that holds the FCC accountable for the result. The *Guidelines* were adopted without the benefit of a notice and comment rulemaking and are therefore not readily subject to court review. Nonetheless, the Commission has made clear that parties disregard these *Guidelines* at their own peril.¹⁵

Third, this initiative failed to take into account the parallel actions of state government, as well as the possible preemptive impact of the guidelines. State efforts and consumer education in this area may well be sufficient to reach the stated policy goals of the *Guidelines*.¹⁶

Fourth, there are other worthy projects at the agency—including other consumer protection efforts well within the FCC’s statutory charge—which deserve full resources before funds are funneled to initiatives like the *FCC/FTC Advertising*

⁸ *In re Joint FCC/FTC Policy Statement For the Advertising of Dial-Around and Other Long-Distance Services To Consumers*, *Policy Statement*, 15 FCC Rcd. 8654 (adopted by the FCC: Feb. 29, 2000; adopted by the FTC, Feb. 23, 2000; rel. Mar. 1, 2000) [hereinafter *FCC/FTC Advertising Guidelines*].

⁹ *See id.* at para. 3. “Pre-selected” in this circumstance means the carrier that the consumer has chosen to be the primary or “default” long-distance carrier for a particular line.

¹⁰ *See id.* at para. 10.

¹¹ *See, e.g.*, Statement of FCC Chairman William E. Kennard on the Joint FCC/FTC Policy on Long-Distance/Dial-Around Advertising (visited May 21, 2000) <www.fcc.gov/

[Daily_Releases/Daily_Business/2000/db0301/stwek017.html](http://www.fcc.gov/Daily_Releases/Daily_Business/2000/db0301/stwek017.html)>.

¹² *See FCC/FTC Advertising Guidelines*, 15 FCC Rcd. 8654, at para. 13–14.

¹³ *Id.* at para. 9.

¹⁴ *Id.* at para. 22.

¹⁵ Chairman Kennard asserts that “[t]he FCC stands ready to take enforcement action against carriers that engage in the kind of misleading practices described in the [*Guidelines*].” *Id.*

¹⁶ Although the FCC has far less experience in the consumer protection area than do states, once the Commission has begun to occupy the field, states may be reluctant to act. This topic is covered more fully in Part IV *infra*.

Guidelines that lie at the edges of, or outside, the FCC's jurisdiction.

Every policy-maker wishes to stop false and misleading advertising. Policy-makers must not, however, permit the desirability of the ends to short change a rigorous analysis of the means.¹⁷ In this regard, initiatives like the *FCC/FTC Advertising Guidelines* are a dangerous trend at the Commission. The trend ultimately undermines the agency's authority, short-circuits the legislative process and harms consumers. An explicit consideration of the public policy principles set out below may not have changed the outcome of the *FCC/FTC Advertising Guidelines* debate, but such considerations at least would have made clear the values and priorities of the agency. The public is never ill served by such a debate.

II. THE *GUIDELINES*' PRECARIOUS LEGAL FOUNDATION

A. The "Follow the Law" Principle

The FCC should follow the law. At first blush, this would not seem to be a particularly controversial proposition.¹⁸ However, few concepts promote consumer welfare more than the willingness of government agencies to humbly follow their legal authority and not exceed it. When agencies do not follow the law, everyone loses. Predictability is lost. Guiding principles become murky and malleable.

¹⁷ For a detailed discussion of the FCC using improper means to achieve arguably popular ends in another context, see Comm'r Furchtgott-Roth's Public Statement, *Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan* (visited June 6, 2000) <http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr932.html>. See also Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses, 14 FCC Rcd. 14,712 (visited June 9, 2000) <http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr949.html> (separate statement of Comm'r Furchtgott-Roth).

¹⁸ Nonetheless, the Commission frequently has trouble even with this basic principle. See *GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). In *GTE Service Corp.*, Chief Judge Edwards, looking to the guidance of AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999), remanded the recent order from *In re Deployment of Wireline Service Offering Advanced Telecommunications Capability* ("Collocation Order"), *First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd. 4761 (1999), because the Commission did not follow the law. See *GTE Service Corp.*, 205 F.3d at 427. The court found that the Commission's "interpretations

Regulators are not legislators. If the law is imperfect, the legislators, not the regulators, must correct it. If the law has obvious problems, legislators can and will fix it. An agency's legitimacy derives solely from following the law as written. When the FCC goes beyond the law as written, it tarnishes the law, reduces the law's legitimacy and by extension, undermines the Commission's own regulatory legitimacy. Agencies do not add anything by doing "good," no matter how tempting. Congress defines the "good" that the FCC should do. It is not for the Commission to direct social policy, override Congress or to expand the agency's jurisdiction to reach every perceived problem.

Regulators do no one a favor by going beyond the law or around it in an attempt to cure some perceived defect. Agencies do not help the public because the public looks to the legislature, not regulators, to write law. The most effective way to force a legislature to correct a bad law is to implement it as written. Independent agencies must simply be implementers of the law—not advocates for its change or advocates for exceeding the law.¹⁹

Predictability and trustworthiness allow markets to flourish. Regulators do not create new technologies nor do they create new services. The FCC does not create consumer benefits. Markets do all of these things and more.²⁰ The Commission should be a reluctant entrant into the market-

of 'necessary' and 'physical collocation' appear[ed] to diverge from any realistic meaning of the statute." *Id.* at 421 In *Bell Atlantic Telephone Co. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), Judge Williams vacated the Commissions ruling *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd. 3689 (1999). The FCC had held that calls to internet service providers could not be considered "local" for purposes of subjecting them to the reciprocal compensation requirement of the Act because such calls are global in nature when considered "end to end." The court held that the FCC had not given a proper justification for why ISP calls that LECs terminate are not seen as "local traffic" subject to reciprocal compensation under 47 U.S.C. § 251(b)(5). See *Bell Atlantic*, 206 F.3d at 5.

¹⁹ See *In re Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, 14 FCC Rcd. 19,868 (1999) (separate statement of Comm'r Furchtgott-Roth).

²⁰ See generally James C. Thomas, *Fifty Years With the Administrative Procedure Act and Judicial Review Remains an Enigma*, 32 TULSA L. J. 259 (1996) (describing the role of separation of powers in the context of the Administrative Procedure Act and the delegation doctrine) [hereinafter Thomas].

place because regulators do not “do” anything. Indeed, the only jobs an agency creates are for Washington lobbyists, retained to navigate the hazardous shoals of its regulations. In the end, the best that agencies can do to “help” markets is to adhere to the law.

B. Application: *The FCC/FTC Advertising Guidelines*

1. *The FTC's Lack of Authority over Common Carrier Advertising*

The *Guidelines* presented an interesting threshold legal question: before even addressing the FCC's authority, why is the FTC not responsible as the primary federal regulator of advertising practices? Most policy-makers—including the FCC—want to curtail practices that are confusing, misleading or even fraudulent. However, Congress generally designated the FTC, not the FCC, as the regulator of advertising. In this case, however, that was not true.²¹ Despite its broad general mandate, the Federal Trade Commission lacks authority over advertising practices by certain industries, including common carriers, under sections 45 and 46 of the Federal Trade Commission Act (“FTC Act”).²² The statute expressly states that the FTC is empowered to regulate advertising and other commercial practices “except [for] banks . . . common carriers . . . air carriers . . . and

[those] subject to the Packers and Stockyards Act.”²³

These exceptions have been long recognized by the courts as binding and unalterable. The lack of authority under the exceptions to the FTC's mandate was described in 1920 in *T.C. Hurst & Son v. FTC*.²⁴ In *Hurst*, a delegation doctrine case, the court reviewed the express language of the FTC Act.²⁵ Citing the enabling statute extensively, the court concluded “[b]anks and common carriers were doubtless excepted from the act.”²⁶ This notion was confirmed by the 1962 Supreme Court antitrust case of *U.S. v. Philadelphia National Bank*.²⁷ The Court in *Philadelphia National Bank* cited *Hurst*, further affirming that the FTC's authority is bounded by its statutory exceptions.²⁸

Cases involving common carriers, air carriers and packers similarly confirm the FTC's lack of statutory authority. Regarding common carriers, *FTC v. Miller*²⁹ held that the FTC could not enforce a subpoena against a common carrier due to the statutory exemptions.³⁰ In *Miller*, the FTC attempted to investigate the advertising of interstate motor carriers.³¹ To assist in its investigation, the FTC subpoenaed some of the carriers' records.³² The subpoenas were opposed, and the FTC sought enforcement in the district court.³³ In overturning the district court's ruling, the Sixth Circuit cited the FTC statute's common carrier ex-

²¹ See Federal Trade Commission Act, ch. 311, 38 Stat. 717, §§ 5, 6 (1914) (codified as amended at 15 U.S.C. §§ 45, 46 (1994 & Supp. 1998)); see also Thomas, *supra* note 20, at 282 (noting that but for these exceptions, the general authority of the FTC in this area is quite broad).

However, it is clear that the FTC cannot act outside these exceptions. See 32 FED. PROC. § 75:13 (1985); see also 32 FED. PROC. § 75:47 (1985); DW 709 PLI/CORP 205, 299 (listing which agency, if any, is responsible for the exceptions to the FTC Act); Jean Noonan, *Federal Trade Commission Enforcement Activities*, 500 PLI/COMM 283 (1989); 54 AM. JUR. 2D *Monopolies, Restraints of Trade and Unfair Trade Practices* § 319 (1996); Stephen Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: the Genesis and Evolution of This Endangered Species*, 32 AM. U. L. REV. 335 (1983) (describing the original jurisdiction of the ICC); 10A FLETCHER ENCYCLOPEDIA OF PRIVATE CORP. § 5046 (1999) (describing authority for antitrust enforcement).

²² Federal Trade Commission Act, ch. 311, 38 Stat. 717, §§ 5, 6 (1914) (codified as amended at 15 U.S.C. §§ 45(a)(2), 46(a), 46(b) (1994 & Supp. 1998)). This enabling statute otherwise empowering the FTC clearly has exceptions regarding regulation of common carriers. See *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977) (applying this exception squarely to misleading advertising by common carriers).

²³ 15 U.S.C. § 45(a)(2).

²⁴ 268 F. 874 (E.D.Va. 1920).

²⁵ The FTC Act then read “[t]he Commission is hereby empowered . . . except banks, and common carriers.” *Id.* at 876 (citing Section 5 of the Federal Trade Commission Act, ch. 311, 38 Stat. 717, Comp. St., §§ 8836a–8836k, Comp. St. § 8836e (1914)).

²⁶ *Id.* at 877.

²⁷ 374 U.S. 321 (1962)

²⁸ See *id.* at 335 n.11; accord *Lorenzetti v. American Trust Co.*, 45 F. Supp. 128, 134 (N.D. Cal. 1942) (stating “banks were specifically exempted from the operation of the Federal Trade Commission Act”); see also Carl Felsenfeld, *The Bank Holding Company Act: Has It Lived Its Life?*, 38 VILL. L. REV. 1, 101 n. 493. (1993).

²⁹ 549 F.2d 452 (7th Cir. 1977).

³⁰ See *id.* at 461. The court related *Miller* to the Supreme Court case of *Leedom*, 358 U.S. 184 (1958) where the NLRB was told not to act since its statutory authority did not reach the intended parties. *But see* *A&B Freight Lines, Inc. v. FTC*, 1980 WL 1787 (D.D.C. 1980) (limiting the application of the *Leedom* doctrine to situations where “unauthorized agency action would destroy a clear, specific statutory right not otherwise protected”).

³¹ See *Miller*, 549 F.2d at 454.

³² See *id.*

³³ See *id.*

emption.³⁴ The court dismissed the FTC's assertion that advertising by common carriers was a non-common carrier activity and thus fell within FTC control.³⁵ Despite the FTC's protests, the court chose to allow these "carve outs" in FTC authority to persist.³⁶ Interestingly, the case goes on to describe the FTC's own failed efforts to have the common carrier exception eliminated during the 94th congressional session.³⁷

Other courts have reached similar results. Regarding air carriers, the Supreme Court indicated in *Nader v. Allegheny Airlines*³⁸ that jurisdiction for consumer complaints resided with the states.³⁹ Likewise, the packers and stockyard exception was sustained in *United Corp. v. FTC*.⁴⁰ In *United*, the FTC attempted to limit the advertising of a meat packer that identified its ham as a product of Virginia.⁴¹ In rejecting the FTC's claim, the Fourth Circuit looked directly to the packers exception in the FTC Act.⁴² The court held that a firm, which falls within the control of the Packers and Stockyard Act and related statutes, simply is not subject to FTC regulation.⁴³

Telecommunications common carriers have experienced similar results. For example, the court in *United States v. Western Union Telegraph Co.*,⁴⁴ invoked the common carrier statutory exception as a ground for dismissal.⁴⁵ In preparation for laying out the Sherman Act claims at issue, the court

clearly stated that "[t]he Federal Trade Commission Act, 15 U.S.C. § 41 et. seq. [*sic*], does not apply to telegraph companies and is not invoked."⁴⁶

In sum, it is clear that the FTC is precluded from regulating common carrier advertising. The language of the FTC's enabling statute is as plain today as it was seventy years ago. In 1929, the Supreme Court in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*,⁴⁷ held that "[t]he definite prohibition of Congress inserted in the act cannot therefore be overridden in the view that Congress intended it to be ignored."⁴⁸ The prohibition could not be ignored in 1929. Nor should it be ignored today. The FTC has no authority over common carrier advertising.

Of course, at some level, this conclusion begs the question: why would Congress carve out certain industries from FTC regulation?⁴⁹ The answer appears to be that Congress originally created other agencies to regulate these industries. Bankers were regulated by the SEC, packers by the USDA, air carriers by the CAB and common carriers by the ICC.⁵⁰ Yet, Congress did not consistently give these agencies jurisdiction over advertising. For some common carrier regulators, such as the FAA (successor to the CAB), their enabling statutes specifically contained provisions about advertising.⁵¹ For the purposes of this article, the key question is whether Congress ever

³⁴ See *id.* at 455.

³⁵ See *id.* at 458. ("The regulatory approach articulated by the Commission, while it may be a desirable one, is not the one Congress appears to have adopted.")

³⁶ See *id.* at 459 ("Congress' recognition of a regulatory gap with respect to banks is implicitly a recognition of such a gap with respect to common carriers as well.")

³⁷ See *id.*

³⁸ 426 U.S. 290 (1976).

³⁹ See *id.* at 292; accord *American Airlines v. Platinum World Travel*, 769 F. Supp. 1203, 1205 (D. Utah 1990) (rejecting defendants' claim that the consumer complaint belonged with the FTC because 15 U.S.C. § 45 "specifically exempts air carriers"). Recently the FCC faced a *Nader*-type request when Southwestern Bell Mobile Sys. petitioned the agency to assert its primary jurisdiction over state law claims in *Smilow v. Southwestern Bell Mobile Sys., Inc.*, Civ. A. No. 97-10307-REK (D. Mass 1996). In the subsequent order, the Commission declined to assert primary jurisdiction regarding the state consumer fraud law claims. See *In re Southwestern Bell Mobile Sys., Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole Minute Increments, Memorandum Opinion and Order*, 14 FCC Rcd. 19,898, para. 10 (1999) [hereinafter *Southwestern Bell Order*].

⁴⁰ 110 F.2d 473 (4th Cir. 1940).

⁴¹ See *id.* at 474.

⁴² See *id.* at 475. ("It was doubtless because plenary power over the unfair trade practices of packers had been vested in the Secretary of Agriculture.")

⁴³ See *id.* at 474; accord *U.S. v. Purdue Farms*, 680 F.2d 277, 284 n.6 (2d Cir. 1982) (relating a situation where, interestingly enough, Purdue wanted to be subject to FTC jurisdiction so it could avoid regulation by the Secretary of Agriculture).

⁴⁴ 53 F. Supp. 377 (S.D.N.Y. 1943).

⁴⁵ See *id.* at 381.

⁴⁶ *Id.*

⁴⁷ 281 U.S. 548 (1929).

⁴⁸ *Id.* at 570.

⁴⁹ See Federal Trade Commission Act, 38 Stat. 717, 719-721 (1914) (stating that the exception for common carriers was included in the original FTC Act); see also Peter C. Ward, FEDERAL TRADE COMMISSION: LAW PRACTICE, PROCEDURE § 3.05[2] (describing the exceptions to the FTC Act); see also Stephanie W. Kanwit, FEDERAL TRADE COMMISSION § 1.06, p. 1-19 (1995) (describing exceptions to the FTC Act).

⁵⁰ See 54A AM. JUR. 2d *Monopolies, Restraints of Trade and Unfair Trade Practices* § 1232 (1996); see also 54 AM. JUR. 2d *Monopolies, Restraints of Trade and Unfair Trade Practices* § 319 (1996).

⁵¹ See *Nader*, 426 U.S. at 295 n.11 (citing Section 11 of the Federal Aviation Act of 1958, subsequently codified at 49 U.S.C. §§ 1381, 1505). Many of these provisions have subse-

granted advertising regulatory authority over telecommunications carriers to the FCC.⁵² Despite numerous amendments, the Communications Act does not give the FCC any explicit authority over advertising.

2. *The FCC's Tenuous Jurisdiction over Advertising Under 47 U.S.C. § 201*

The *FCC/FTC Advertising Guidelines* assert FCC authority over advertising solely based on Section 201(b) of the Act.⁵³ That section "requires that common carriers' practices . . . for and in connection with . . . communication service, shall be just and reasonable."⁵⁴ The *FCC/FTC Advertising Guidelines* then contend that advertising qualifies as a "practice" under the statute.⁵⁵ However, the plain meaning of the term "practices" taken in the context of Section 201 clearly does not reach advertising. This is particularly true in light of Congress' ability to craft explicit "advertising" jurisdiction over common carrier services when it desires such jurisdiction. For example, Congress has specifically granted the FTC jurisdiction over "advertisement[s] for pay-per-call services."⁵⁶

In the end, if the Commission reads "practices" to include advertising, it will be difficult to discern what the term does not include.⁵⁷ For example, are labor and employment policies of telephone companies equivalent to "practices" under the

Act? Could the Commission thus issue hiring guidelines for common carriers? Is the use of energy efficient equipment a "practice"? Could the Commission mandate use of certain fuel-efficient service vans? These examples may seem extraordinary; it would be difficult to argue that the statute supports such a sweeping assertion of jurisdiction. Yet, the assertion of authority over advertising is no less extraordinary. Indeed, the FCC is no more expert in fuel efficiencies or hiring practices than they are in advertising. Simply put, a limitation without a reasonably foreseeable end is not a limitation at all.

The questionable nature of the FCC's authority in this area is best illustrated by the Commission's prior experiences.⁵⁸ Despite the Act's sixty-five years on the books, the *FCC/FTC Advertising Guidelines* cite only two cases in which the Commission has equated "practices" with advertising.⁵⁹ This lack of precedent alone demonstrates how significant a step these *Guidelines* are in expanding the reach of the Commission's authority. The first case cited by the *FCC/FTC Advertising Guidelines* is the *In re Business Discount Plan* forfeiture order.⁶⁰ That 1998 decision represents the only clear assertion of Commission authority over advertising under Section 201. Even in that case, however, the advertising claim arose out of complaints regarding the unauthorized switching of long-distance provider—or "slamming"—an area in which

quently been eliminated due to airline deregulation. See also Jonathan Blacker, Comment, "Fly to London for \$298": *The Battle Between Federal and State Regulation of Airfare Advertising Heats Up*, 61 J. AIR. L. & COM. 205 (1995) (describing in Part III the statutory history of airline regulation and deregulation, including the 1984 transfer of consumer protection duties from the CAB to the DOT and warning of Federal preemption); Laynie Giles, Note, *Interpreting the Airline Deregulation Act of 1978: Federal Preemption Over State Deceptive Advertising Laws*, 22 TRANSP. L. J. 87 (1984); 54A AM. JUR. 2d *Monopolies, Restraints of Trade and Unfair Trade Practices* § 1232 (1996); 54 AM. JUR. 2d *Monopolies, Restraints of Trade and Unfair Trade Practices* § 319 (1996).

⁵² Of course, jurisdiction over telecommunications providers passed from the ICC to the FCC long ago. See Mann-Elkins Act, 36 Stat. 539 (1910) (giving the ICC regulatory authority over communications common carriers); see also PETER HUBER ET AL., *FEDERAL TELECOMMUNICATIONS LAW* 16 (1999) (describing the Mann-Elkins Act); Scott Cooper, *Technology and Competition Come to Telecommunications: Reexamining Exemptions to the Federal Trade Commission Act*, 49 ADMIN. L. REV. 963 (1997) [hereinafter *Cooper*] (reviewing ICC jurisdiction over telecommunications granted through the Mann-Elkins Act of 1910 and its transfer to the FCC in the Communications Act of 1934).

⁵³ See *FCC/FTC Advertising Guidelines*, *supra* note 8, at

para. 4. Nowhere in the guidelines does the FTC assert any jurisdiction. Presumably, the FTC gains its authority through the FCC's invitation to publish "joint" guidelines.

⁵⁴ 47 U.S.C. § 201(b).

⁵⁵ See *FCC/FTC Advertising Guidelines*, *supra* note 8, at para. 4.

⁵⁶ 15 U.S.C. § 5711.

⁵⁷ Some confuse the *desire* to do "good" with the *authority* to do good. Such was the case with the *FCC/FTC Advertising Guidelines*. See *FCC/FTC Advertising Guidelines*, *supra* note 8, at 18.

⁵⁸ See *Southwestern Bell Order*, *supra* note 39 (denying CMRS providers request for a declaration of federal preemption over "neutral application of state contractual or consumer fraud laws").

⁵⁹ See *FCC/FTC Advertising Guidelines*, *supra* note 8, at para. 4 n.2 (citing *In re Business Discount Plan, Inc.*, *Notice of Apparent Liability for Forfeiture*, 14 FCC Rcd. 340, 355-358 (1998); *In re AT&T's Card Issuer Identification Cards*, *Letter*, 7 FCC Rcd. 7529 (1992)). Both cases were within the last ten years, and neither was appealed on this issue. As shown below, both cases are best described in terms other than as advertising complaints.

⁶⁰ *In re Business Discount Plan, Inc. Apparent Liability For Forfeiture*, *Notice of Apparent Liability*, 14 FCC Rcd. 340 (1998).

the Commission has clear jurisdiction under 47 U.S.C. § 258. *Business Discount Plan* can best be interpreted as an indication that deceptive advertising that results in illegal activity may aggravate such conduct and result in more severe FCC sanctions. Moreover, it is one thing to examine ancillary advertising as part of an investigation into issues clearly within the FCC's purview; it is quite another to have the Commission regulate advertising *qua* advertising.

The second case cited in the *FCC/FTC Advertising Guidelines* is even weaker. That 1992 case, *In re AT&T*⁶¹ is not specifically about broad-based advertising. Rather, it concerns disclosures contained in the Card Issuer Identification ("CIID") format calling cards distributed by telecommunications carriers.⁶² In its letters to cardholders, AT&T stated that "government requirements" mandated that AT&T issue new calling cards. AT&T's literature also asked the customer to destroy their old card. The Commission staff determined that the letter's request could mislead consumers into destroying not only AT&T cards, but also those marketed jointly with other carriers and those issued by other carriers alone.⁶³ While the FCC in *AT&T* did not find any violation of Section 201(b), a "letter of admonishment" was issued under the agency's general authority contained in Section 4(i). This section allows the Commission to "issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."⁶⁴ In the end, *AT&T* did not squarely or rigorously address the scope of Section 201's "practices" language.⁶⁵

As these cases illustrate, even if the FCC has recently nibbled on the edges of advertising regulation, it is quite another matter for the Commission, through these *Guidelines*, to enter into the

advertising-regulation arena full stride after sixty-five years of dormancy.

3. Courts Have Been Reluctant to View Section 201's "Practices" Language to Include Advertising

The frailty of the Commission's precedent is further betrayed by the skeptical view courts have taken of the application of Section 201 to advertising.⁶⁶ Although the jurisdictional issue regarding advertising alone has never been squarely presented, courts have examined the scope of the FCC's advertising authority in the context of various federal preemption cases. While the legal analyses in these cases are distinguishable, the decisions illustrate the facial weaknesses of the Commission's jurisdictional assertions. For example, a federal district court in New Jersey concluded that "Sections 201, 202 and 203 of the Communications Act impose no duty on common carriers to make accurate and authentic representations in their promotional practices."⁶⁷

In holding that claims asserting violations of state advertising law could proceed against a carrier, the Second Circuit similarly held that "while the [Act] does provide some causes of action for customers, it provides none for deceptive advertisement and billing."⁶⁸ That court concluded that the Act "does not indicate a uniquely federal interest . . . in preventing a carrier from misrepresenting the nature of its rates to its customers."⁶⁹ The Seventh Circuit's message to the FTC in *Miller* is equally applicable to the FCC here: "The regulatory approach articulated by the Commission, while it may be a desirable one, is not the one Congress appears to have adopted."⁷⁰ In sum, the generic statutes of the FTC and the FCC do

⁶¹ *In re AT&T's Card Issuer Identification Cards, Letter*, 7 FCC Rcd. 7529 (1992).

⁶² *See id.* at 7529.

⁶³ *See id.* at 7529-30.

⁶⁴ *Id.* at 7530.

⁶⁵ Some have argued that *In re Telecommunications Research and Action Center and Consumer Action Complainants v. Central Corporation International Telecharge, Inc., Memorandum Opinion and Order*, 4 FCC Rcd. 2157 (1989) [hereinafter *TRAC*], also supports Section 201 advertising authority. Yet this order was not cited by the Commission in its *Guidelines*, nor did the decision reach advertising *qua* advertising. Rather, *TRAC* turned on the reasonableness of the charged rates—an issue squarely within the FCC's authority. *See* 47 U.S.C. §§ 201, 203, 204; *see also TRAC*, 4 FCC Rcd. at para. 11.

⁶⁶ *See supra* notes 59-62 and accompanying text.

⁶⁷ *Weinberg v. Sprint Corp.*, 165 F.R.D. 431 (D. N.J. 1996) (emphasis added). Similarly, other courts have held that the Act does not provide a remedy for failure of advertising to fully disclose certain components of services, or even fraudulent advertising. *See DeCastro v. AWACS*, 935 F. Supp. 541 (D. N.J. 1996); *In re Long Distance Telecommunications Litig.*, 831 F.2d 627 (6th Cir. 1987).

⁶⁸ *Marcus v. AT&T*, 138 F.3d 46, 54 (2d Cir. 1998).

⁶⁹ *Id.*

⁷⁰ *Miller*, 549 F.2d at 458 (holding that the FTC had no authority to regulate common carriers who were then regulated by the Interstate Commerce Act). Under *Miller* the FTC has no authority over common carriers' advertising, and under the Act the FCC also lacks such authority. *Id.* As Comm'r Furchtgott-Roth said in his dissent, joint statements

not readily define any federal role in common carrier advertising regulation.

4. *The Pay-Per-Call Experience*

At least one recent enactment by Congress indicates that it is both aware of the FCC's jurisdictional limits and is able to alter those limits through legislation when the need arises. When faced with a public policy need, Congress has given power over common carrier advertising to the appropriate agency. In the early 1990s, the pay-per-call industry experienced rapid growth. Part of the growth included services that charged large per-minute or per-call charges. Some of these charges were not fully disclosed. To stem concerns about these practices, in 1992 Congress passed the Telephone Disclosure and Dispute Resolution Act ("TDDRA").⁷¹ TDDRA grants the FTC authority over the advertising practices of pay-per-call services, while granting the FCC expanded powers regarding carriers of such services.⁷² This statutory scheme at least supports the notion that Congress is aware of the common carrier exclusion and has chosen to lift that exclusion only for particular services.⁷³

Pay-per-call abuses raise issues similar to the customer concerns that the *FCC/FTC Advertising Guidelines* seek to address. However, when Congress sought to solve problems created by pay-per-call service advertising, it specifically assigned that duty to the FTC, while assigning carrier regulation to the FCC.⁷⁴ Why? Because Congress under-

stood that the FTC lacks authority over pay-per-call services' advertising under the "common carrier" exemption, yet the FTC has the expertise to address advertising abuses. Thus, while Congress gave the FCC distinct regulatory responsibilities over carriers, it left advertising regulation to the FTC. If the FCC already had authority over "advertising," as asserted in the *Guidelines*, no one, including Congress, the President and the witnesses who testified on the merits of TDDRA, appeared to believe that the FCC already had such authority.⁷⁵ Given this background, only an explicit statutory grant of authority over advertising regulation should permit the FTC or FCC to proceed with the *Guidelines*.

* * *

In the end, the FCC's authority to promulgate advertising guidelines is unsubstantiated. While the FTC clearly lacks such authority, the FCC's own precedent is quite weak and the courts have been highly skeptical of such an assertion of Commission authority. Moreover, TDDRA contradicts the idea that Congress intended Section 201's "practices" to include advertising. Nonetheless, it is possible, perhaps even likely, that a court facing a challenge to the FCC's authority to promulgate the *Guidelines* would uphold the agency's action. Courts can and do uphold FCC rules, even if a court explicitly notes that the rule is inconsistent with the clearest and most straightforward inter-

from the impotent agencies cannot resolve this issue.

⁷¹ *Telephone Disclosure and Dispute Resolution Act*, Pub. L. 102-556, 106 Stat. 4190 (codified at 15 U.S.C. §§ 5701, 5711-5714, 5721-5724 (1994)) [hereinafter *TDDRA*]. For background on *TDDRA* see Scott Cooper, *Technology and Competition Come to Telecommunications: Reexamining Exemptions to the Federal Trade Commission Act*, 49 ADMIN. L. REV. 963 (1997) (giving a thorough background on the *TDDRA* and the authority it granted). See also Christopher R. Day, *Hanging Up On Consumers: Why the FCC Cannot Stop Slamming In the New Telecommunications Market*, 47 AM. L. REV. 421 (1997) (explaining slamming and the lack of adequate consumer protection under the 1996 Act); William Burrington and Thaddeus Burns, *Hung Up on the Pay-Per-Call Industry?; Current Federal and Legislative Developments*, 17 SETON HALL LEGIS. J. 359 (1993) (describing *TDDRA*).

⁷² See *TDDRA*, *supra* note 71.

⁷³ One need not be a scholar of the "*Chevron* doctrine," set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 847 (1984), to see that such an explicit statutory exclusion likely keeps the FTC from asserting any power in the area of common carrier advertising under *Chevron* Step I: "First, always, is the question whether

Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. *But see* *Mobile Communications v. FCC*, 77 F.3d 1399, 1404, 1406 (D.C. Cir. 1996) (describing section 4(i) as the "necessary and proper clause" of the Act and holding that the FCC had "affirmative statutory support" to require a last minute payment from Mobile for a license that would be of high dollar value if that license were sold at auction, even if the plain language of the authorizing statute exempted Mobile from the licensing fee requirements).

⁷⁴ In title I, *TDDRA* amends the FCC's enabling statute to apply its appropriate expertise. See 47 U.S.C. § 228. In title II, *TDDRA* amends the FTC's enabling statute to allow this limited oversight of common carrier activities. See 15 U.S.C. §§ 5711-5714. Congress also passed Section 228 of the Act to give the FCC additional tools to combat 900 services' abuses.

⁷⁵ Otherwise the statutory authority granted in the *TDDRA* would have been superfluous. A better reading is that the Commission and the FTC previously lacked the authority given in *TDDRA*. Here the agency would require a similar grant of authority prior to any action.

pretation of the statutory language.⁷⁶ However, the “follow the law” precept is not simply a matter of whether the Commission action would be upheld by a court. Rather “follow the law” means acting well within the clearest and most straightforward interpretation of the Commission’s statutory mandate. By any measure, the *Guidelines* skirt near the edge of a most imaginative interpretation of the FCC’s statutory charge. As discussed above, when proposed actions rely on statutory silence for their authority, it creates a particularly high burden to justify the proposed action on other grounds.⁷⁷

III. THE TRANSPARENCY AND ACCOUNTABILITY IDEAL

A. The Principle of Transparency and Accountability

Regulation should be transparent, accessible and visible to ordinary Americans. It should not be an arcane art for Washington lawyers. Citizens should not have to go to Washington or hire high-priced specialists to have their voices heard. Further, the process that leads to policy should be open. No one should be setting policy involving significant public interest behind closed doors at

the FCC.⁷⁸ These decisions should be made with full public input and discernible explanation.⁷⁹ Fortunately, government long ago accepted many of these basic democratic principles of sound decision-making and adopted statutes, such as the Administrative Procedure Act (“APA”), to achieve these goals. Agencies should be reluctant to stray too far from these protections. Ad hoc proceedings undermine the goals of transparency, openness, predictability and accountability. For example, in “merger” cases, the financial stakes are high, and unfortunately, the process has been at its most opaque.⁸⁰ However, license transfer proceedings have not been the only forum in which the Commission has short-changed the public and the process.

The agency’s use of “Policy Statements” rather than rules to implement new regulatory policies is also disturbing.⁸¹ By removing selected issues from the rigors of the APA, the agency largely eliminates the opportunity for interested parties and the public to participate in the policy development process. These decisions also are shielded from judicial review. Moreover, it is not clear what regulatory goals the Commission attempts to achieve through “Policy Statements” rather than formal rules.⁸² In many cases, it appears that the

⁷⁶ See, e.g., *Texas Public Utility Counsel v. FCC*, 183 F.3d 393, 443–444 (5th Cir. 1999) (acknowledging that “[w]hile courts have rightly warned against using silence in a statute to give ‘agencies virtually limitless hegemony,’ we are convinced that Congress intended to allow the FCC broad authority to implement this section of the Act”). The court also stated that “[a]lthough the best reading of the [Act] does not authorize the agencies actions, we find the statute sufficiently ambiguous to . . . defer to the FCC’s interpretation.” *Id.* at 441–443.

⁷⁷ See *supra* note 76 and accompanying text.

⁷⁸ See Press Statement Of Comm’r Harold Furchtgott-Roth, *In re SBC-Ameritech License Transfer Proceeding* (Oct. 6, 1999) <www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr948.html>. As a matter of public record, these companies and FCC staff were negotiating. But exactly what were they negotiating? Not about the proper application of FCC license transfer rules because, in this area, the Commission has no rules. Nonetheless these private negotiations yielded extensive commitments from SBC and Ameritech for “voluntary” conditions on their license transfers. No one knows what goes on behind closed doors. See also Harold Furchtgott-Roth, *The FCC Racket*, WALL ST. J. (Nov. 5, 1999) <www.fcc.gov/Speeches/Furchtgott_Roth/fccRack.html>.

⁷⁹ See Testimony of FCC Comm’r Furchtgott-Roth Before the House Committee on Commerce, Subcommittee on Telecommunications, Trade, and Consumer Protection, *The Telecommunications Merger Review Act of 2000* (Mar. 14, 2000) <www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr004.html> (reiterating concerns that merger conditions

were being added to FCC review without public scrutiny).

⁸⁰ Comm’r Furchtgott-Roth has been extremely vocal regarding the FCC’s use of ad hoc procedures and closed door meetings in evaluating license transfers—the so-called “merger review process.” Unlike the Justice Department’s merger review process, the Commission has crafted a process that is ad hoc, unpredictable, nontransparent and virtually inexplicable. This, of course, causes delay and confusion. See *In re Application For Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation to SBC Communications Inc.*, CC Dkt No. 98-25 (Oct. 23, 1998) <www.fcc.gov/Speeches/Furchtgott-Roth/Statements/sthfr858.html> (separate statement of Comm’r Furchtgott-Roth). See also *In re Application of WorldCom Inc. and MCI Communications Corporation For Transfer of Control of MCI Communications Corporation to WorldCom*, CC Dkt No. 97-211 (Sept. 14, 1998) <www.fcc.gov/Speeches/Furchtgott-Roth/Statements/sthfr846.html> (separate statement of Comm’r Furchtgott-Roth); *In re For Consent to Transfer Control of Teleport Communications Group to AT&T Corp.* (visited Mar. 2, 2000) <www.fcc.gov/Speeches/Furchtgott-Roth/Statements/sthfr838.html> (separate statement of Comm’r Furchtgott-Roth).

⁸¹ See Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). Notice and comment rulemaking are called for under the APA. Consequently, informal “Policy Statements” have no authority or standing.

⁸² See generally Robert A. Anthony, *Pro-Ossification: A*

Commission is merely trying to avoid the procedural rigors of notice-and-comment rulemaking, while implicitly demanding licensees' compliance with these less formally promulgated policies.

B. Application of the Transparency and Accountability Principle to the *FTC/FCC Advertising Guidelines*

Unfortunately, in adopting the *Guidelines* the Commission strayed from transparency and accountability. The Commission did not issue a Notice of Proposed Rulemaking, nor did it seek comment from the public. Instead, the *Guidelines* emerged in full form from the agency. No party had an opportunity to file comments that presented the jurisdictional issues discussed above. No state attorneys general were able to describe the roles played by the states. No consumers were able to express their views about the need for the *Guidelines*. No service providers could share their best advertising practices. A notice-and-comment process might not have changed the outcome. But the public would have been able to learn that the FCC was contemplating the *Guidelines*, inform the FCC of their views and have the satisfaction of believing that their views were taken into consideration.

The *Guidelines* are an oddity in administrative law. They are not binding per se, thus a carrier cannot be prosecuted for violating them. Nonetheless, carriers can be prosecuted for "practices" under Section 201(b) that are not "just" and "reasonable." The *Guidelines* will apparently provide guidance to the Commission in evaluating what is "just" and "reasonable" under the statute. Thus, in a way, the *Guidelines* became binding. Yet, despite their real world impact, these *Guidelines* may

evade judicial review because they are not strictly "binding."⁸³

Based on these factors, the *Guidelines* do not fulfill the agency's obligation to transparency and accountability.

IV. A HEALTHY RESPECT FOR FEDERALISM

A. The Principle of Federalism and the Merits of Decentralization

Good regulation is not necessarily FCC regulation; in many areas, states are often in the best position to provide the necessary regulatory oversight. The government that is closest to the people often makes better policy decisions for the public. Consistent with this view, Congress routinely and clearly delegates some authority to the FCC and reserves other authority for the states.⁸⁴ The Commission should defend the jurisdictional lines drawn by Congress so that it does not intrude upon the authority of the states.

Given the Commission's discrete authority and limited resources, the FCC should be reluctant to interfere in areas where states and localities have exercised their authority and implemented public policy solutions. Yet, the FCC's power over state issues is perhaps greater and preemptions more frequent than they have ever been. FCC encroachment has been accomplished both by expansive interpretations of FCC jurisdiction that only implicitly diminish state authority, as well as by explicit preemption of state authority.⁸⁵ The prominence of the Commission should make it particularly cautious about expansive jurisdictional interpretations that may inadvertently chill state and local oversight and control.⁸⁶

Harder Look At Agency Policy Statements, 31 WAKE FOREST L. REV. 667 (1996) (asserting that the courts' deferential view to the legal authority of "Policy Statements" is anti-libertarian as it takes the right to affect policy through the courts away from the public). The author goes further to suggest that the courts, in determining whether a policy was "arbitrary and capricious," should engage in an intensive inquiry into the "underlying wisdom" of the policy statement and place the burden on the agency to show its policy rests on a "foundation of logic and fact." *Id.* at 689-90.

⁸³ See *In Re Broadcast Equal Employment Opportunity Enforcement Policy As To Religious Broadcasters* (visited Mar. 2, 2000) <www.fcc.gov/Speeches/Furchtgott-Roth/Statements/sthfr807.html> (separate statement of Comm'r Furchtgott-Roth) (describing the problems of using "guidelines" rather than valid legal standards).

⁸⁴ See, e.g., 47 U.S.C. §§ 224, 251, 252, 271, 332.

⁸⁵ See *In re Implementation of Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, Declaratory Ruling*, CC Dkt. 96-98, and *Notice of Proposed Rulemaking*, CC Dkt. No 99-68, FCC 99-38 (Apr. 25, 1999); see also Kasey Chappelle, *The End of the Beginning: Theories and Practical Aspects of Reciprocal Compensation for Internet Traffic*, 7 COMM'LAW CONSPECTUS 393 (1999) (reviewing the impact of reciprocal compensation regulation).

⁸⁶ States have created websites and consumer complaint filing centers to address these issues. See, e.g., California Department of Consumer Affairs, *Consumer Information Center* (visited May 21, 2000) <www.dca.ca.gov/cic>. The states have actively pursued fraud in sweepstakes, pay-per-call and other areas. Many states have distributed information on how to de-

B. Application of the Federalism and Decentralization Principle to the *FCC/FTC Advertising Guidelines*

The FCC and FTC are not the only government entities available to help consumers with advertising complaints. State consumer protection laws and agencies are already well equipped for this task. State and local governments also have the jurisdiction and resources to act.⁸⁷ Indeed, it appears that states have actively applied and enforced their authority consistent with consumer interests. Therefore, it is not clear from a policy or consumer perspective that FCC intervention is necessary or even particularly helpful. Moreover, FCC intervention may actually cause harm by raising questions about federal preemption of state false advertising claims.

The federal role envisioned by the *Guidelines* may not be warranted because the states have been actively pursuing false advertising claims against common carriers. For example, Iowa has a criminal statute directly addressing telephone advertising issues.⁸⁸ As the state legislature found: "customers of telephone services have been subjected to fraud in the sale and advertisement of telephone long-distance and local services . . . It is the intent of the general assembly to provide the attorney general with additional remedies to address the issue of fraud in the sale of telecommunications services."⁸⁹ Similarly, the New York State Attorney General's Office recently settled a dis-

pute with Qwest over a misleading promotion involving free airline tickets.⁹⁰ In the negotiations, the Attorney General's Office indicated it would continue to review telecommunications advertisements and take action against those that it believed to be misleading. As illustrated by these examples, the states simply have more experience than the FCC in addressing consumer protection issues related to fraud, misleading claims or false advertising. Moreover, these local enforcement priorities are likely better attuned to local needs than is a national program emanating from Washington.

Consumers also frequently avail themselves of state law-based actions against allegedly false and misleading advertising. In the wireless arena alone, there have been at least fifty-one class action suits filed against service providers, often involving the alleged failure of carriers' advertising to fully disclose the relevant terms of their billing practices.⁹¹ These complaints often incorporate both federal and state claims.⁹² However, carriers often argue that the Commission's primary jurisdiction over wireless rates preempts the state claims in the litigation.⁹³ In addressing these claims, many courts have concluded that the "savings clause" in Section 414 of the Act⁹⁴ preserved the right of parties to pursue state remedies.⁹⁵ In light of state regulatory activity, resources, expertise and state consumer protection statutes, there may be little need for the *FCC/FTC Advertising*

sect fraud. See, e.g., California Department of Consumer Affairs, *Consumer Information* (visited May 21, 2000) <www.dca.ca.gov/r_r/index.html>.

⁸⁷ See, e.g., IOWA CODE ANN. § 714 D.1 (West 2000); VA CODE ANN. § 59.1-200 (West 2000); MINN. STAT. ANN. § 325F.69 (West 2000).

⁸⁸ See *id.*; see also *Southwestern Bell Order*, *supra* note 39.

⁸⁹ IOWA CODE ANN. § 714 D.1.

⁹⁰ See Press Release from Office of New York State Attorney General Elliot Spitzer, *Spitzer Seeks Fair Play Among Long Distance Carriers* (visited Apr. 12, 2000) <www.oag.state.ny.us/press/1999/sep/sep13a_99.html>.

⁹¹ See IOWA CODE ANN. § 714 D.1; *Southwestern Bell Order*, *supra* note 39.

⁹² See *Tenore v. AT&T Wireless Services, Inc.*, 136 Wash. 2d 322, 328 (1998) (addressing claims under "breach of contract, negligent misrepresentation, fraud, and violation of the Washington Consumer Protection Act").

⁹³ See *id.* (stating that "AT&T contends this [federal] statute preempt Appellants' state law claims"); see also *Fetterman v. Green*, 689 A.2d 289, 294 (Pa. 1997) (noting that despite a general presumption of dual jurisdiction, the need to have consistent radio frequency regulation preempted state law tort claims). Jurisdictional disputes are not solely resolved in

court, however. At the Commission, the Wireless Consumer Alliance ("WCA") recently filed a petition seeking a declaratory ruling that the states are not preempted from applying consumer protection and other fraud laws to wireless service providers. See *In re* Petition Of The Wireless Consumer Alliance, Inc. for a Declaratory Ruling on Communications Act Provisions and FCC Jurisdiction Regarding Preemption of State Courts from Awarding Monetary Damages Against Commercial Mobile Radio Service Providers for Violation of Consumer Protection or Other State Laws, *Petition for Declaratory Ruling*, WT 99-263, DA 99-1458 (Jul. 15, 1999) [hereinafter *WCA Petition*] (calling attention, additionally, to several other matters regarding a state's ability to impact the behavior of the industry). The FCC ruled that, as a general matter, the Act does not pre-empt the award of monetary damages by state courts based on state tort or contract claims. See *In re* Wireless Consumers Alliance, Inc., *Memorandum Opinion and Order*, WT Dkt. No. 99-263, FCC 00-292, para. 2 (rel. Aug. 14, 2000) [hereinafter *WCA Memorandum Order*].

⁹⁴ 47 U.S.C. § 414 ("Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.")

⁹⁵ See *WCA Petition*, *supra* note 93.

Guidelines.⁹⁶ Furthermore, the *Guidelines* may actually harm state efforts to regulate advertising. The mere existence of federal guidelines promulgated under the auspices of the Act may create uncertainty regarding the preemption of state law claims in this area. Although the *FCC/FTC Advertising Guidelines* assert that they “[do] not preempt existing state law,”⁹⁷ they may, at the very least, raise new questions about the viability of the state law claims discussed above. As one district court recently held, the savings clause of Section 414 “must be read to preserve only state claims that address obligations *different from those created by the Communications Act*.”⁹⁸ Even if state claims are ultimately allowed, the mere fact that opponents to these consumers may have further support for a federal preemption defense will delay the adjudication of state law claims and increase the cost of the litigation.⁹⁹ Even before the *FCC/FTC Advertising Guidelines*, it was clear that courts often struggle to determine where federal jurisdiction ends and state law claims begin.¹⁰⁰ These *Guidelines* will only add to this confusion.

Almost twenty-five years ago, the Supreme Court gave guidance for such preemption cases. In *Nader v. Allegheny Airlines*,¹⁰¹ the Court allowed state law claims to stand despite statutory language in the Federal Aviation Act giving certain consumer protection roles to the FAA.¹⁰² In *Nader*, the well-known plaintiff was bumped from his flight to Hartford where he was to give a speech to a consumer group.¹⁰³ In the subsequent contro-

versy, the plaintiff refused the tender of a future free flight and pursued a state fraudulent representation claim, as well as a federal statutory claim.¹⁰⁴ After a decision favorable to the plaintiff rendered by the district court, and subsequent reversal by the court of appeals, the Supreme Court held that neither the filed rate doctrine nor the doctrine of primary jurisdiction precludes an action for damages on common law fraud grounds against an airline.¹⁰⁵

In a line of cases dating back to 1986, courts have found that the Act does not preempt state-based claims, specifically in the case of fraudulent or misleading advertising.¹⁰⁶ The preemption premise has been most often based on the federal “filed-rate” doctrine. Under the most common rationale for allowing the state claims, courts have concluded that fraudulent advertising actions do not challenge the actual rates charged, but only the manner in which they are communicated. Thus, the filed-rate doctrine does not protect the carriers from these state law claims. This reasoning was recently reaffirmed in *Lipcon v. Sprint Corp.*¹⁰⁷ Lipcon challenged Sprint’s practice of not disclosing the expiration dates on its phone cards.¹⁰⁸ In allowing the state claims to go forward, the court found the carrier’s preemption claim meritless and determined that any effect on rates was “speculative at best.”¹⁰⁹

Preemption of advertising claims against wireless carriers was raised in a 1998 Washington state

⁹⁶ While consumer protection is sometimes required, at other times markets may police themselves. With complete information, the distrust engendered by disappointed consumers forces a firm to change its ways or face extinction.

⁹⁷ *FCC/FTC Advertising Guidelines*, *supra* note 8, at para. 10.

⁹⁸ *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1168 (S.D.N.Y. 1996), *aff’d*, 138 F.3d 46 (2d Cir. 1998) (emphasis added); *see also* *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 707 n.6 (1st Cir. 1977). Recently, but prior to the release of the *Guidelines*, the Commission affirmed the availability of state claims in this area. *See Southwestern Bell Order*, *supra* note 39.

⁹⁹ Some cases have bounced back and forth between state and federal courts through removals and remands.

¹⁰⁰ *See In re Long Distance Telecommunications Litig.*, 831 F.2d 627, 633 (6th Cir. 1987) (“We believe the district court erred in holding that the state law claims for fraud and deceit . . . were preempted by the Communications Act.”); *see also Tenore*, 136 Wash. 2d at 349. (holding that “[t]he matter falls within the conventional competence of the courts without the need for referral to the FCC”). *See generally* *DeCastro v. AWACS*, 935 F. Supp. 541 (D. N.J. 1996); *In re Comcast Cellular Telecommunications Litigation*, 949 F. Supp. 1193

(E.D. Pa. 1996); *Zimny v. AWACS*, 958 F. Supp. 947 (D. Del. 1997); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428 (1986). *But see Bastien v. AT&T Wireless*, 205 F.3d 983 (7th Cir. 2000) (holding that Section 332(c)(3) of the Act barred plaintiff’s claim because the resulting award would have the same effect as ratemaking).

¹⁰¹ 426 U.S. 290 (1976).

¹⁰² *See id.* at 307 (stating “[p]assengers may . . . pursue their remedy under the common law”).

¹⁰³ *See id.* at 292 (surprising as it seems, apparently the airline did not know with whom it was dealing).

¹⁰⁴ *See id.* at 295.

¹⁰⁵ *See id.* at 302 (“Congress did not intend to require private litigants to obtain an [FAA] determination before they could proceed with the common-law remedies.”).

¹⁰⁶ *See, e.g., Kellerman*, 112 Ill. 2d 428; *DeCastro v. AWACS*, 935 F. Supp. 541 (D. N.J. 1996); *Zimny v. AWACS*, 958 F. Supp. 947 (D. Del. 1997).

¹⁰⁷ 962 F. Supp. 1490, 1494–95 (S.D. Fla. 1997); *see also WCA Memorandum Order*, *supra* note 93.

¹⁰⁸ *See id.*

¹⁰⁹ *Id.* at 1494. (stating “[t]he prosecution of these claims will in no way interfere with the delivery of long distance telephone service to defendant’s customers”).

case against AT&T Wireless Services.¹¹⁰ The parties alleged that AT&T's advertisements were misleading because they failed to disclose the practice of rounding up to the next full minute in charges for airtime.¹¹¹ The court ultimately concluded that the Act's "savings clause" preserved the state law claims.¹¹² The court found that the filed-rate exception did not apply, since wireless providers are not rate regulated and thus do not file rate tariffs. In rejecting preemption, the court held that state laws provided supplemental protection against activities for which the Act did not allocate regulatory authority to a federal agency.¹¹³

At the end of the day, it is not clear that the *FCC/FTC Advertising Guidelines* will necessarily alter the preemption analysis described above. Nonetheless, it is clear that courts have not read the "practices" language in Section 201 of the Act as granting the FCC jurisdiction over advertising. To the contrary, these preemption cases have frequently found that there is no role for the FCC in advertising regulation. The *Guidelines* inevitably alter this calculus. Although the ultimate conclusion that state law claims are permitted may not change, the Commission may have significantly muddied the waters for consumers seeking the protection under state consumer protection laws.

V. A ZERO SUM GAME

A. Principle of a Zero Sum Game

Assuming that a proposed action falls within the FCC's jurisdiction and satisfies the other threshold criteria set forth above, it still may not be advisable to proceed if other, more worthy activities must be forsaken to pursue a proposed initiative. Stated in more practical terms, Congress prescribes a budget for the Commission that it believes is commensurate with the agency's statutory mandate. In most cases, to take on new tasks, the Commission must reallocate resources from elsewhere in its budget. In economic terms, it is a zero sum game.¹¹⁴ Funding must be taken from one area to fund another. Therefore, new initia-

tives inherently contain an implicit subjective judgment: the Commission deems a new initiative more important than other existing or potential programs or policies. There is no question that the Commission's existing funding levels impact its decision-making. The Chairman himself has recently called for expenditure reductions (through curtailed travel and a limited hiring freeze) due to funding concerns.¹¹⁵

In developing its spending priorities, the Commission should first fully fund all activities that it is statutorily obligated to carry out. Only after these core functions have been fully funded should the FCC even consider branching off in new directions where its authority is less clear. As described above, possible Commission activities can be thought of in four categories: (1) mandated, (2) permissible, (3) not clearly contemplated and (4) barred. Those agency actions that are clearly required by the statute should receive full funding before any examination of activities in the second or third category.

Despite its resource limitations, the Commission rarely makes these hard choices explicit. Instead, especially in the case of new "initiatives," there appears to be little appreciation of the implicit choices at work. New initiatives almost invariably mean positive press attention without any accountability or mention of their impact on agency resources. Yet, new initiatives often mean that some core statutory functions, such as interference enforcement or licensing processing, may go unfunded or under funded. But there will not be a press release touting the new advertising protections while at the same time adequately describing the corresponding cuts in personnel assigned to review the safety of cell phones. Licensing delays and backlogs, universal service assistance and development of more refined bidding processes all need support. Yet, the Commission presses on into areas outside its mandate, where every dollar spent could have gone towards meeting goals more closely tied to the FCC's statutory mission.

¹¹⁰ See *Tenore v. AT&T Wireless Services and McCaw Cellular Communications, Inc.*, 962 P.2d 104 (Wash 1998).

¹¹¹ See *id.* at 106.

¹¹² See *id.*

¹¹³ See *id.* at 117.

¹¹⁴ Anyone who has ever managed a household budget knows what the reality of zero sum budgeting entails. Simply

put, money spent on one activity cannot also be spent on another. For example, money spent on eating out is money that cannot be spent on a new refrigerator. The FCC should assess its budget in the same way.

¹¹⁵ At this writing, the FCC continues under a hiring freeze and a travel moratorium.

B. Application of the Zero Sum Game Principle to the *FCC/FTC Advertising Guidelines*

Even assuming the *Guidelines* were supportable under every other consideration, they do not withstand scrutiny as the most productive use of agency resources. The *FCC/FTC Advertising Guidelines* have already consumed significant resources and likely will continue to divert attention away from the FCC's statutorily mandated activities. Other, more pressing, consumer protection initiatives that are more squarely within the agency's statutory charge deserve these limited resources. Many have asked: "How could you oppose the FCC's protection of consumers from fraudulent advertising?" The answer is also a question: "How could you oppose the FCC fully staffing and funding its primary and explicit statutory responsibilities?"

The drafting of the *FCC/FTC Advertising Guidelines* consumed substantial resources. Interpreting and implementing the *Guidelines* and their progeny will demand significant additional energy. Moreover, the agency's current lack of expertise will exacerbate the resource drain. Indeed, the task of monitoring advertising of these services is daunting in scope. Hundreds, if not thousands, of noncarriers advertise these services. Although the FCC does not have jurisdiction over noncarriers, their advertising will suddenly pull these entities within the agency's purview. Businesses and groups, from 7-Eleven to the Rotary Club, from Wal-Mart to the NHL, often market telecommunications services. The potential resource implications of reaching all of these possible players are staggering.

In a period of hiring freezes and travel moratoria, the Commission should not divert resources to advertising supervision. As set out above, inherent in this advertising initiative is the Commission's implicit decision to move resources away

from other activities. Rather than deploy resources to pursue an initiative grounded in statutory silence, the Commission should deploy resources in areas where it has explicit (and often sole) jurisdiction to protect consumers.¹¹⁶ For example, the Commission has clear, congressionally mandated authority over a number of consumer protection initiatives, including interstate obscene and harassing phone calls,¹¹⁷ unsolicited interstate fax advertisements,¹¹⁸ slamming¹¹⁹ and radio interference.¹²⁰ Too often the Commission does not have the resources to promptly and comprehensively address consumer concerns in these core jurisdictional areas. Indeed, a strong case can be made that consumers would derive greater benefits from more aggressive enforcement operations against unsolicited faxing than they would from duplicative advertising regulation. Such prioritization seems consistent with a statute that grants the FCC exclusive jurisdiction over unsolicited faxes, but says nary a word about FCC advertising regulation. Before the agency ventures forth beyond its clear statutory mandate, it must first take care of its primary statutory responsibilities. In a zero sum resources game, the Commission too often acts first and budgets later.

VI. CONCLUSION

In looking at the four factors outlined above, the decision to dissent from the *FCC/FTC Advertising Guidelines* was not a close call. If authorized at all, the Commission's authority to regulate carrier advertising is at the outer edges of its jurisdiction. The *Guidelines* were developed in a largely opaque process without the benefit of notice and comment and without the accountability that comes with traditional rulemaking. Even if authorized and promulgated in an open procedural context, the *Guidelines* address an area already subject to substantial state oversight. Thus, it is not clear

¹¹⁶ The Commission has moved in recent years to step up its consumer and enforcement activities. These steps include creation of the Enforcement and Consumer Information bureaus. The agency already has a significant docket regarding these issues before these new enforcement initiatives. See Common Carrier Bureau Releases Statistics on Telephone-Related Complaints and Consumer Tips and Scams, Rpt. No. CC-48, Dec. 17, 1998 (finding that "[i]n 1997, CCB handled a total of 44,035 telephone related complaints"). The Common Carrier Bureau also reported the following yearly statistics: in 1997, 20,475 slamming complaints;

1998, first half, 597 slamming complaints; 1998, 4,480 cramming complaints. See *id.* See also The Common Carrier Bureau Consumer Protection Branch Launches Paperless Environment, DA 97-2458, Nov. 25, 1997 (observing that there are "over 40,000 consumer complaints about telephone service" each year).

¹¹⁷ See 47 U.S.C. § 223 (1994 & Supp. 1997).

¹¹⁸ See 47 U.S.C. § 227 (1994 & Supp. 1997).

¹¹⁹ See 47 U.S.C. § 258 (1994 & Supp. 1997).

¹²⁰ See 47 U.S.C. § 302 (1994).

that federal action is necessary, and it is possible that FCC action may actually harm state efforts via preemption. Finally, in allocating Commission resources, there appear to be many stronger candidates for FCC attention than carrier advertising.

In the end, some may disagree about the merits of the *FCC/FTC Advertising Guidelines*. That is not, however, the most significant part of the debate. Instead, it is essential that the Commission explicitly consider the factors set out above in its decision-making. The Commission should assess

where a given decision lies on the continuum of its authority. Additionally, the Commission should practice openness and accountability. The Commission is well advised to consider the role of the states and the relative need for federal intervention. Finally, the Commission should make explicit resource allocation decisions in assessing the utility of new initiatives. Such an open discussion of these considerations would give Congress, industry and the public a full and clear debate on the challenges we face and the priorities we value.