



FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF GENERAL COUNSEL
OFFICE OF ECONOMICS AND ANALYTICS

memorandum

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TO: FCC Bureau and Office Chiefs

FROM: Thomas M. Johnson, Jr., General Counsel, Office of General Counsel
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SUBJECT: Legal Framework and Considerations for Regulatory Impact Analysis

On January 30, 2018, the Commission voted to establish the Office of Economics and Analytics (OEA).¹ Following all necessary approvals, including approval by the Office of Management and Budget, Congress, and the National Treasury Employees Union, OEA began operations on December 7, 2018.² OEA's duties include (1) performing cost-benefit analysis for major rulemakings and (2) reviewing other rulemakings in order to consider their economic impacts.³

Specifically, for all rulemakings, OEA's responsibilities include (1) collaborating with and advising other Bureaus and Offices "in the areas of economic and data analysis and with respect to the analysis of benefits, costs, and regulatory impacts of Commission policies, rules, and proposals;"⁴ (2) confirming that it has reviewed each rulemaking "to ensure it is complete before release to the public;"⁵ and (3) reviewing and commenting on significant issues of economic and data analysis raised in connection with proposed actions.⁶ OEA also conducts "economic, statistical, cost-benefit, and other data analysis of the impact of existing and proposed communications policies and operations."⁷

This Memorandum provides attorneys and other Commission staff with background on the role of economic analysis in the Commission's rulemaking, and guidance on how to incorporate economic analysis into the rulemaking process. A Regulatory Impact Analysis (RIA) represents the breadth of

¹ See *Establishment of the Office of Economics and Analytics*, Order, 33 FCC Rcd 1539 (2018) (*OEA Order*).

² FCC, Establishment of the Office of Economics and Analytics, 83 Fed. Reg. 63073 (Dec. 7, 2018).

³ Although this Memorandum is concerned principally with OEA's role in rulemakings, OEA will also (1) manage the FCC's auctions in support of and in coordination with FCC Bureaus and Offices; (2) develop policies and strategies to help manage the FCC's data resources and establish best practices for data use throughout the FCC in coordination with FCC Bureaus and Offices; (3) provide analytic support; and (4) conduct long-term research on ways to improve the Commission's policies and processes in each of these areas.

⁴ 47 CFR § 0.21(b).

⁵ 47 CFR § 0.21(d). The Commission's rules state that OEA must review rulemakings before *public release*. See *id.* In practice, however, this typically requires OEA review before *circulation*—to ensure all Commissioners' offices have notice of any accompanying regulatory impact analyses.

⁶ *Id.* § 0.21(e).

⁷ See *id.* § 0.21(j).

economic analysis that is part of a rigorous decision-making process. An RIA defines the ends that a regulation is intended to achieve, identifies alternatives to meet that end, and then identifies costs and benefits associated with each alternative to allow for comparison of these alternatives. The goal of RIA is to determine whether the benefits of a rule outweigh its costs, or, in some circumstances, to discern the most cost-effective way to achieve a regulatory goal. A key element of RIA is *cost-benefit analysis*, in which both costs and benefits of regulatory alternatives are evaluated and reduced, to the extent possible, to monetary terms. For *major* rulemakings, which have an economic impact of \$100 million or more, OEA prepares a “rigorous, economically-grounded cost-benefit analysis.”⁸

This Memorandum is designed to assist those involved in Commission rulemaking by explaining (1) the legal and policy role of RIA and other economic analysis; and (2) the elements of a “rigorous, economically-grounded cost-benefit analysis” required by the Commission’s rules for major rulemakings. While the formal cost-benefit analysis described in section II of this Memorandum is applicable only for *major* rulemakings, components of this analysis—defining the ends that regulation is intended to achieve, identifying alternatives, and identifying costs and benefits—will apply to many rulemakings in which OEA is called to provide economic analysis.⁹

I. Background for the Inclusion of Economic Analysis in Commission Actions

The Commission’s rules recognize the importance of performing an informed economic analysis when Commission actions implicate significant economic issues. As an initial matter, the Commission’s rules make OEA responsible for performing a cost-benefit analysis of major rulemakings and advising the Bureaus and Offices on other rulemakings and in the areas of economic and data analysis.

There are several reasons why the Commission incorporates economic analysis in its regulatory decision making. *First*, 47 CFR § 0.21 codifies the Commission’s commitment to considered and meaningful economic analysis in its regulatory actions. These regulations require that OEA assist with issues of economic analysis that arise in all rulemakings, and that OEA conduct a formal cost-benefit analysis for major rulemakings.¹⁰ *Second*, economic analysis is useful in making economic determinations required by several provisions in the Communications Act. *Third*, economic analysis can be necessary—or at least helpful—to defend against claims that the Commission’s rulemaking decisions are “arbitrary and capricious” in violation of the Administrative Procedure Act.

Because these authorities may guide how and when the Commission considers economic analysis in its rulemaking, we briefly discuss each below.

⁸ *Id.* § 0.21(c).

⁹ This memorandum is intended only to improve the internal management of the Commission and does not create any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

¹⁰ *Id.* § 0.21(b)-(e).

A. Economic analysis under Commission rules

OEA's functions are set forth in section 0.21 of the Commission's rules.¹¹ Section 0.21 details OEA's involvement in "all Commission actions involving significant economic or data analysis."¹² Among other duties and responsibilities, OEA:

- "Collaborates with and advises other Bureaus and Offices in the areas of economic and data analysis and with respect to the analysis of benefits, costs, and regulatory impacts of Commission policies, rules, and proposals";
- "Prepares a rigorous, economically-grounded cost-benefit analysis for every rulemaking deemed to have an annual effect on the economy of \$100 million or more";
- "Confirms that the Office of Economics and Analytics has reviewed each Commission rulemaking to ensure it is complete before release to the public"; and
- "Reviews and comments on all significant issues of economic and data analysis raised in connection with actions proposed to be taken by the Commission and advises the Commission regarding such issues."¹³

In voting to establish OEA, the Commission stated that this organizational change would "integrate the use of economics and data analysis into the Commission's various rulemakings and other actions in a more comprehensive and thorough manner."¹⁴ In particular, the Commission explained, OEA is "charged with ensuring that economic analysis is deeply and consistently incorporated into the agency's regular operations."¹⁵ This charge encompasses "provid[ing] economic analysis, including cost-benefit analysis, for rulemakings, transactions, adjudications, and other Commission actions."¹⁶

Apart from these Commission rules, no statute or similar authority expressly requires the Commission to conduct a formal cost-benefit analysis as part of its rulemaking activities. This distinguishes the Commission from numerous other federal agencies that are required by executive order to use RIA as the standard method of ensuring careful analysis of proposed regulatory action.¹⁷ In the United States, presidential executive orders since 1993 have required agencies, other than independent

¹¹ *Id.* § 0.21.

¹² *Id.*

¹³ *Id.* § 0.21(b)-(e).

¹⁴ *OEA Order*, 33 FCC Rcd at 1539, para. 1.

¹⁵ *Id.*, para. 3.

¹⁶ *Id.*

¹⁷ Internationally, the Organization for Economic Cooperation and Development (OECD) discusses the importance of RIA and its near universal adoption by member countries:

Regulatory Impact Analysis (RIA) is a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives. As employed in OECD countries it encompasses a range of methods. It is an important element of an evidence-based approach to policy making . . . Some form of RIA has now been adopted by nearly all OECD members, but they have all nevertheless found the successful implementation of RIA administratively and technically challenging.

OECD, *Regulatory Impact Analysis*, <http://www.oecd.org/gov/regulatory-policy/ria.htm> (last visited Sept. 23, 2020).

regulatory agencies like the Commission, to conduct RIAs before issuing economically significant regulations.¹⁸ In particular, EO 12866 requires other federal agencies to assess the proposed action's anticipated benefits, its anticipated costs, and the costs and benefits of potentially effective and reasonably feasible alternatives, as well as to describe the need for the regulatory action and explain how the regulatory action will meet that need. EO 12866 also sets forth 12 regulatory principles to which other agencies should adhere to the extent permitted by law, including that the agency shall identify the problem that it intends to address, identify and assess available alternatives to direct regulation, and assess both the costs and benefits of the intended regulation.¹⁹ In 2003, the Office of Management and Budget (OMB) issued Circular No. A-4 to provide detailed guidance to federal agencies to assist them in performing the evaluation required under EO 12866.²⁰ While as an independent agency the Commission is not bound by EO 12866, this memorandum draws from principles and guidance set forth in that Executive Order and in OMB Circular A-4.

B. Economic analysis under the Commission's organic statutes

Although the Communications Act does not expressly require the Commission to conduct a formal cost-benefit analysis as part of its rulemaking activities, several statutory provisions call for the Commission's consideration of economic issues. For example, section 11 requires the Commission to conduct a biennial review of its regulations under the Act and "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of [telecommunications] service."²¹ Similarly, the Commission must determine quadrennially whether any of its media ownership rules "are necessary in the public interest as the result of competition" and "repeal or modify any regulation it determines to be no longer in the public interest."²² In another example, the Commission is statutorily directed to forbear from applying any regulation or any provision of the Communications Act to telecommunications carriers or services if it determines that certain conditions are met, and in doing so it must consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."²³

¹⁸ Executive Order No. 12866, *Regulatory Planning and Review*, 8 Fed. Reg. 51735, Section 6(b), (c) (Sept. 30, 1993) (EO 12866). *See also id.*, Sections 3(b) (defining "agency" to exclude independent regulatory agencies), 3(f) (defining "significant regulatory action" to include, among other things, actions that may have an annual effect on the economy of \$100 million or more).

¹⁹ *Id.*, Section 1(b). *See also id.*, Section 1(a) ("In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. . . . [I]n choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits . . . unless a statute requires another regulatory approach."). Executive Order No. 13563, promulgated in 2011, reaffirms the principles, structures, and definitions set forth in EO 12866. Executive Order No. 13563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821, Section 1 (Jan. 18, 2011).

²⁰ *See* Office of Management and Budget, Circular No. A-4, *Regulatory Analysis*, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf> (OMB Circular A-4).

²¹ 47 U.S.C. § 161(a)(2).

²² Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996).

²³ 47 U.S.C. § 160(b).

Other provisions may *imply* a need to consider economic issues if appropriate under the circumstances. Several provisions of the Communications Act, for example, refer to actions that are “appropriate” or “necessary” in contexts that may encompass economic analysis.²⁴ In *Michigan v. Environmental Protection Agency*, the Supreme Court found that the EPA’s statutory obligation to regulate if it determined regulation was “appropriate and necessary” implied that the agency had an obligation to consider the costs and benefits of the regulation.²⁵ The Court observed that the word “appropriate,” in particular, is “the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.”²⁶ Therefore, the Court continued, unless the context clearly indicates otherwise,

the phrase ‘appropriate and necessary’ requires at least some attention to cost. One would not say that it is rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. . . . No regulation is ‘appropriate’ if it does significantly more harm than good.²⁷

The Court thus found that the EPA’s interpretation of “appropriate and necessary” to exclude consideration of costs “entirely fail[ed] to consider an important aspect of the problem.”²⁸ At the same time, the Court made clear that the requirement to pay “some attention to cost” did not necessarily require a formal cost-benefit analysis. Rather, it was for the agency to determine what this assessment should consist of:

We need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value. It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost.²⁹

²⁴ See, e.g., 47 U.S.C. § 220(b) (providing that in connection with the uniform system of accounts, the Commission may prescribe the treatment of depreciation charges “for such carriers as it determines to be appropriate,” and may modify such classes and percentages “when it deems necessary”); 47 U.S.C. § 254(h)(1)(B) (providing that telecommunications carriers shall provide services upon request to schools and libraries at a rate that is discounted in an “amount that the Commission, with respect to interstate services, . . . determine[s] is appropriate and necessary to ensure affordable access to and use of such services by such entities”); 47 U.S.C. § 336(b)(4) (providing that the Commission’s regulations governing advanced television service licenses shall include “such technical and other requirements as may be necessary or appropriate to assure” signal quality).

²⁵ *Michigan v. EPA*, 576 U.S. 743, 743 (2015) (citing 42 U.S.C. § 7412(n)(1)(A)).

²⁶ *Id.* at 752 (quoting *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222, 1266 (Kavanaugh, J., concurring in part and dissenting in part)).

²⁷ *Michigan v. EPA*, 576 U.S. at 752.

²⁸ *Id.* (quoting *Motor Vehicle Mfrs. Ass’n. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). Notably, the dissenting Justices agreed that if the EPA had failed entirely to consider costs the regulation would be invalid, although they believed on the facts that the EPA’s regulatory process as a whole sufficiently incorporated cost considerations. See *Michigan v. EPA*, 576 U.S. at 769 (Kagan, J., dissenting) (“Cost is almost always a relevant – and usually, a highly important – factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing a standard-setting process that ignores economic considerations”) (internal quotation omitted).

²⁹ *Id.* at 759. We note that few of the Act’s provisions use the phrase “necessary and appropriate,” see, e.g., 47 U.S.C. § 254(h)(1)(B), and that courts have upheld interpretations of the word “necessary” in the Act to mean

(continued....)

A number of other provisions in the Communications Act may also expressly or impliedly call for economic analysis in other contexts.³⁰

C. Consideration of economic impacts under the Administrative Procedure Act

An informed analysis of economic issues may also be necessary to ensure that the agency's decision is not deemed "arbitrary and capricious" under the Administrative Procedure Act (APA). This economic analysis will often include an assessment of costs and benefits. While the nature and extent of analysis the court may expect will depend upon the specifics of the proceeding, it is always prudent at least to consider how economic analysis may strengthen the Commission's decision making.

Some of the principal APA considerations that may inform the Commission's use of economic analysis in support of sound rulemaking are set forth in the seminal case of *State Farm*.³¹ In *State Farm*, the Supreme Court stated that an agency rule is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."³² Furthermore, the Court noted that, unless the governing statute provides otherwise, inattention to costs and benefits may be a "fail[ure] to consider an important aspect of the problem," and an agency explanation that insufficiently addresses economic issues and record evidence risks running counter to the evidence before the agency.³³

Case law is plentiful with examples in which the ability of a Commission rule to withstand an APA challenge turned on the Commission's consideration—or failure to consider—economic factors. For example, in *Verizon Communications, Inc. v. FCC*, the Commission's economic rationale was critical in defending against an APA challenge to the Commission's adoption of a methodology for calculating the cost of unbundled network elements that incumbent local exchange carriers were required to offer to their competitors. The Court first determined, based on common usage and historic practice, that the

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convenient, useful, or helpful—not essential or indispensable. See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391-94 (3d Cir. 2004) (discussing prior cases). In each case, such terms "must be read in their statutory context." *Id.* at 392 (quoting *GTE Serv. Corp. v. FCC*, 373 F.3d 392 (D.C. Cir. 2000)).

³⁰ See, e.g., 47 U.S.C. § 309(j)(3)(B) (noting that the Commission's competitive bidding procedures should, among other things, "promot[e] economic opportunity and competition and . . . avoid[] excessive concentration of licenses"); 47 U.S.C. § 544a(c)(1) (specifying the factors that the Commission shall consider in prescribing such regulations, including maximizing competition, costs and benefits to consumers, and the need for cable operators to protect the integrity of their signals against theft); 47 U.S.C. § 605(g) (directing the Commission to consider, in the satellite cable programming context, consumer costs and benefits, costs and benefits to other authorized users of encrypted satellite programming, effects on competition, and impacts of delay).

³¹ *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

³²*Id.* at 43.

³³ For example, in *State Farm* itself, the Court overturned as insufficiently supported the National Highway Transportation Safety Agency's conclusion that it could not reliably predict requiring automatic seatbelts in automobiles would lead to more than a 5-percentage point increase in seatbelt usage. While the Court acknowledged that uncertainty as to benefits could be a valid reason for declining to adopt a regulation, it found NHTSA's decision arbitrary and capricious on, among other grounds, that it had failed to conduct a rigorous analysis of the benefits of alternatives (for example, the benefits of non-detachable safety belts as compared to detachable safety belts). *Id.* at 51-55.

Commission's use of a forward-looking rather than a historical definition of cost was within the range of reasonable interpretation.³⁴ The Court then rejected several arguments that the particular forward-looking methodology the Commission chose would not effectively advance the purposes of the statute and that it should have selected a different methodology. In doing so, the Court discussed at length the Commission's economic rationale for the efficacy of its selection, including its reliance on data suggesting that the methodology had been effective in practice, as well as its reasons for finding flaws in several alternatives that had been suggested in the record.³⁵ While the Court recognized that it was "in no position to assess the precise economic significance" of the objections to the Commission's analysis, it was "enough to recognize" that the objections "may well be incorrect,"³⁶ and the Commission's expert consideration of those objections merited deference.

In other cases, too, courts have upheld the Commission's assessment of the costs and benefits of its regulations where the Commission has adequately explained the basis for its conclusions and has addressed contrary arguments in the record.³⁷ For example, the Commission's economic analysis was central to the Tenth Circuit affirming in full the Commission's comprehensive reform of its universal service and intercarrier compensation rules.³⁸ More recently, economic analysis was critical to the Commission's defense of an order altering regulations governing business data services (BDS) in *Citizens Telecommunications Co. v. FCC*.³⁹ In *Citizens Telecommunications*, the Eighth Circuit upheld both the reasonableness of the Commission's finding about the competitiveness of service based on the low incremental costs of supplying new customers, as well as the Commission's cost-benefit analysis supporting its order. The Commission's success in defending its regulations turned largely on the fact that the underlying order was supported by a detailed discussion of both the economic theory applied by the Commission, as well as the Commission's careful analysis of data in the record regarding effect of competition on the market price of BDS services.⁴⁰

In *ALLTEL Corp. v. FCC*, by contrast, the D.C. Circuit found a Commission rule arbitrary and capricious, in part because the Commission had failed to properly address an economic argument regarding the costs of a proposed rule raised by commenters.⁴¹ In that case, the court considered a challenge to a Commission rule that certain small telephone companies, which otherwise would have been eligible to develop their tariffs based on an average cost schedule rather than by calculating their actual costs, could not take advantage of this option if they were affiliated with another company that

³⁴ *Id.* at 497-501.

³⁵ *Id.* at 503-23.

³⁶ *Id.* at 507.

³⁷ See, e.g., *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (noting that the Commission sufficiently explained why costs of alternative proposed by commenter outweighed the benefits); *Charter Communications, Inc. v. FCC*, 460 F.3d 31, 41-42 (D.C. Cir. 2006) (noting that the Commission appropriately weighed costs and benefits of cable set-top box integration ban); *National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095, 1122-25 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985) (finding that the Commission sufficiently evaluated submissions of parties regarding costs and benefits to support its adoption of access charge regime for multiple-line systems).

³⁸ See *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

³⁹ 901 F.3d 991 (8th Cir. 2018).

⁴⁰ See, e.g., *id.* 1006-14.

⁴¹ See generally *ALLTEL Corp. v. FCC*, 838 F.2d 551 (D.C. Cir. 1988).

used actual costs and the overall enterprise had annual operating revenues in excess of \$40 million. The Commission had justified this rule on the ground that companies with such affiliations could better bear the burden of performing company-specific cost studies. The court held, however, that it could not “assume, in the face of comments to the contrary, and without supporting arguments from the Commission, that the wealth of a holding company somehow reduces the high cost of cost studies relative to the benefits derived from those studies.”⁴²

This is not to say that the APA requires economic analysis—including formal cost-benefit analysis—in every circumstance. As with the other legal authorities discussed above, the nature and the extent of the analysis required will turn on context. For example, the economic analysis that a court will expect may turn on the state of the record and the extent to which a rational justification for a rule inherently depends upon economic considerations.

II. Guidance on Cost-Benefit Analysis in Commission Rulemaking

This section defines the elements of a good cost-benefit analysis, focusing on the formal analysis required for major rulemakings—those with an annual impact of \$100 million or more.⁴³ The formal analysis described in this section—specifically, the rigorous quantification and comparison of costs and benefits (described in section II.C)—is generally required only for major rulemakings. Nevertheless, components of this analysis—such as defining the ends that a regulation aims to achieve (described in section II.A) and identifying alternatives (described in section II.B)—will apply to many rulemakings in which OEA is called to opine. Because we recognize that every rulemaking is unique, this section broadly outlines best practices, rather than prescribing rigid rules. The relevant employees of each Bureau and Office should work closely with OEA to determine the correct approach for each rulemaking.⁴⁴

A good cost-benefit analysis should include the following three elements: (1) a statement of the need for the regulation; (2) an examination of alternative approaches; and (3) an evaluation of the benefits and costs of the proposed regulation and its main alternatives.⁴⁵ Each of these elements should be present for all formal cost-benefit analysis of major rules. These elements are discussed in turn below.

A. Clearly identify the need for regulatory action

Before the Commission adopts a regulation, it should demonstrate that the regulation is necessary. Accordingly, Notices of Proposed Rulemaking (NPRMs), and any subsequent Report and Order, should include a discussion of the need for regulatory action and how the action will meet that need.⁴⁶ Among other reasons, a rule may be justified to (1) improve government processes; (2) interpret

⁴² *Id.* at 558; *see also NARUC*, 737 F.2d at 1127-29.

⁴³ 47 CFR § 0.21(c). The structure of this section draws from the Securities and Exchange Commission’s (SEC) Current Guidance on Economic Analysis in SEC Rulemakings Memorandum, dated March 16, 2012. In that memorandum the SEC, also an independent federal agency, formalized its commitment to economic analysis in SEC decision-making processes. *See generally* SEC, Guidance on Economic Analysis in SEC Rulemakings (2012), http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

⁴⁴ This determination should be made as early as possible in the process; drafting staff should consult OEA staff when considering policy options, or as soon thereafter if possible. *See* Section III, *infra*, for a detailed description of integrating economic analysis into Commission work.

⁴⁵ *See, e.g.*, OMB Circular A-4.

⁴⁶ In the case of an NOI, this may be a more general discussion of the possible need for regulatory action and request (continued....)

provisions in statutes that the Commission administers; (3) forbear from statutory obligations where such forbearance is in the public interest⁴⁷; or (4) to address market failures or further other social purposes. With respect to regulations aimed at correcting market failures, the Commission should consider whether federal regulation is necessary *at all*, or whether methods short of federal regulation could address the problem more efficiently (for example, antitrust enforcement, consumer litigation, or state and local regulation).

In some circumstances, Congress or a court may direct the Commission to take a regulatory action. In these circumstances, the Commission should cite the directive as the justification for its action, should explain the discretion available to it in implementing the directive, and should explain the regulatory instruments that it might use to accomplish the directive.⁴⁸ In these instances, economic analyses may be used to determine the most efficient, least costly, or most socially beneficial means to comply with such a directive.

B. Consider alternative regulatory approaches

After determining that regulatory action is appropriate, the Commission should identify and consider alternative regulatory approaches. The following are examples of regulatory alternatives to consider⁴⁹:

- *Different compliance dates.* The timing of a regulation may affect its net benefits. For example, delaying implementation of a rule affecting the payment of USF subsidies may cause less disruption to carriers by allowing them to better plan for a proposed rule.
- *Different degrees of stringency.* A more stringent rule may have both higher costs and higher benefits, and stringency can be adjusted to achieve the highest net benefit. For example, stricter service quality standards may result in incrementally higher quality services, but increased compliance costs might outweigh the marginal benefits of higher quality service.
- *Informational measures rather than regulation.* Where regulatory action is aimed at addressing a market failure arising from inadequate or asymmetric information, informational remedies might be more effective than regulatory mandates. For example, it may be more sensible to require carriers to *disclose* what they are charging for an item on a bill than to *restrict* what carriers can charge for certain items.⁵⁰

Given the practical limits on the Commission's capacity, the Commission should winnow alternatives down to a number that it can realistically consider with thorough analysis. OMB Circular A-4 states that "[t]he number and choice of alternatives selected for detailed analysis is a matter of judgment," and recognizes that "[t]here must be some balance between thoroughness and the practical

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for comment.

⁴⁷ See 47 U.S.C. § 160.

⁴⁸ See, e.g., OMB Circular A-4 at 3-4.

⁴⁹ These alternatives draw from OMB Circular A-4. See OMB Circular A-4 at 7. Other examples are (1) different requirements for different size firms; (2) different requirements for different geographic regions; (3) performance standards rather than design standards; (4) market-oriented approaches rather than direct controls; and (5) different choices defined by statute.

⁵⁰ See generally 47 CFR § 64.2401 (setting forth the Commission's Truth-in-Billing Requirements).

limits on your analytical capacity.”⁵¹ Thus, the question for economic analysis principally is whether, under all the circumstances, the selection of alternatives affords reasonable assurance that the preferred approach effects an efficient tradeoff of costs and benefits. Such alternatives must include those suggested by commenters that are “neither frivolous nor out of bounds.”⁵² “[W]here a party raises facially reasonable alternatives . . . the agency must *either* consider those alternatives or give some reason . . . for declining to do so.”⁵³ The Notice of Inquiry (NOI) or NPRM should also solicit public comment to help identify alternatives and inform the economic analysis of those alternatives.

C. Identify and measure the costs and benefits of a proposed regulation and its alternatives

After determining that regulation is necessary and identifying possible regulatory alternatives, the initiating Bureau or Office staff and OEA economists should work together to evaluate the costs and benefits—quantitative and qualitative—of the proposed regulation and its alternatives. This requires (1) developing a baseline against which to measure the costs and benefits of a proposed regulation; (2) identifying and describing the most likely economic benefits and costs of the proposed rule and alternatives; (3) quantifying those costs and benefits, to the extent possible; and (4) taking steps to ensure that the analysis is transparent and reproducible.

1. Develop a baseline.

The costs and benefits of a proposed action should be compared with a clearly stated alternative. For that reason, a first step is articulating a baseline for the rulemaking, which describes the state of the world in the absence of the proposed rule. This includes the state of the market, including how that market is expected to evolve; the current state of regulation, including regulations promulgated by the Commission or other government entities; and the degree of compliance with existing laws and regulations.⁵⁴ It is important to clearly describe the assumptions that underlie the relevant baseline and to detail those aspects of the baseline that are uncertain.⁵⁵

⁵¹ OMB Circular A-4 at 7. *See also Chamber of Commerce of the United States v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (agency “is not required to consider ‘every alternative conceivable by the mind of man’” (quoting *State Farm*, 463 U.S. at 51)).

⁵² *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (quoting *Chamber of Commerce v. SEC*, 412 F.3d 133, 145 (D.C. Cir. 2005)).

⁵³ *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989) (emphasis in original); *see also, e.g., American Gas Association v. FERC*, 593 F.3d 14, 19-21 (D.C. Cir. 2010); *City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153, 1168-70 (D.C. Cir. 1987); *NARUC*, 737 F.2d at 1129.

⁵⁴ *See* OMB Circular A-4 at 15. *See also Turner Broad. v. FCC*, 910 F. Supp. 734, 768 (D.D.C. 1995), *aff’d sub nom. Turner Broad. Sys., Inc. v. FCC.*, 520 U.S. 180, 117 S. Ct. 1174, (1997) (challenging the FCC’s baseline in examining the costs and benefits of must-carry rules).

⁵⁵ Where a statute directs rulemaking, the Commission should consider the overall economic impacts, including *both* those attributable to Congressional mandates *and* those that result from an exercise of the Commission’s discretion. This allows for a better evaluation of alternative means of meeting the mandate and provides a more complete picture of a rule’s economic effects. Finally, when considering alternatives, it may be preferable to evaluate the economic implications of alternatives against the proposed rule, since the primary inquiry in considering the alternatives is whether these alternatives are better or worse (in terms of achieving the regulatory purpose in a cost-effective manner) than the proposed rule.

2. Identify relevant benefits and costs.

The initiating Bureau or Office staff and OEA economists should work together to identify and quantify the potential costs and benefits of the proposed rule and its regulatory alternatives.⁵⁶ Ultimately, the goal will be to measure a rule's *net benefits*—the difference between its projected benefits and costs. By comparing the net benefits of the proposed rule against the net benefits of its alternatives, the Commission can make a more informed choice among alternatives.⁵⁷ The following are general principles regarding the measuring of costs and benefits that apply to most rulemakings.⁵⁸

Benefits. Naturally, the benefits of a rule will relate to the rule's justification.⁵⁹ The economic benefits of a rule could include, for example:

- Private-sector compliance savings (e.g., reduced compliance costs as a result of eliminated or relaxed reporting requirements);
- Benefits to consumers (e.g., improved access due to the deployment of advanced telecommunications capabilities);
- Promotion of economic efficiency (e.g., industry consolidation that results in more efficient ownership structures as a result of removing outdated regulatory barriers to consolidation); and
- Enhancement of health, safety, etc. (e.g., facilitating faster and more reliable service from first responders as a result of strengthened 911 rules).

Costs. The benefits will be compared against the rule's costs. These should include compliance costs, as well as the direct and indirect costs of a rule. The costs of a rule could include, for example:

- The Commission's administrative costs (e.g., the costs of monitoring and enforcing compliance with a rule);
- Private-sector compliance costs (e.g., the costs of completing a quarterly filing requirement or complying with a network security requirement);
- Negative distributional and competitive effects of a rule (e.g., where a USF contribution requirement falls disproportionately on one group of carriers); and
- Adverse effects on economic efficiency, private markets, health, safety, etc., including the potential for the rule to distort incentives (e.g., where a rule incentivizes inefficient behavior such as traffic pumping).

⁵⁶ In addition to the direct benefits and costs, the economic analysis should address significant ancillary economic consequences.

⁵⁷ As OMB Circular A-4 recognizes, discerning which regulatory approach is most efficient is useful information for decisionmakers, "even when economic efficiency is not the only or the overriding public policy objective." OMB Circular A-4 at 2.

⁵⁸ The following list of costs and benefits is meant only to be illustrative, and not a comprehensive list.

⁵⁹ In most circumstances, the Commission's cost-benefit analysis should focus on the benefits and costs that accrue to citizens and residents of the United States. *See* OMB Circular A-4 at 15 ("Your analysis should focus on benefits and costs that accrue to citizens and residents of the United States. Where you choose to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects should be reported separately.").

3. Quantify costs and benefits to the extent feasible.

Where possible, these costs and benefits should be quantified and expressed in monetary units. The initiating Bureau or Office staff and OEA economists should work together to develop the methodology used to obtain estimates. Those groups should determine, as early as possible, whether they have the proper data to quantify costs and benefits and, if not, how they can develop such data. Before issuing an NOI or NPRM, economists should identify any specific data that would be necessary for or that would assist in quantification and should consider various mechanisms by which to seek such data.

Where costs and benefits cannot be quantified, the Commission should be candid about that fact—and should explain why that is the case. If OEA has tentatively concluded that costs or benefits cannot be quantified, the Report and Order should explain why quantification is not practicable and include a qualitative analysis of the likely economic consequences of the proposed rule and reasonable regulatory alternatives.⁶⁰ This may occur, for example, where only the parties to a proceeding have the relevant cost data and they have declined to provide the data to the Commission. Where the Commission encounters difficulty in measuring costs and benefits, it is critical to be transparent regarding those difficulties.

4. Ensure that the analysis is transparent, reproducible, and supportable.

A good analysis should be transparent, reproducible, and supported by the available data. The Commission should present its economic analysis evenhandedly and candidly and should be forthright about any limitations in the data or its analysis. In general, this means that any analysis produced by OEA and the initiating Bureaus and Offices should comply with the following basic principles of good RIA:

Transparency regarding the underlying data. Where monetization or quantification is possible, the Commission should be transparent about the data on which its analysis relies. Where possible, the NPRM should include these numbers and solicit comment on them and the adopting release should address any comments on those numbers, including any data submitted to challenge them. When quantifying costs and benefits, staff should describe the measurement approach used, include references to statistical and stakeholder data if available, and specify the timeframe analyzed. If additional studies or evidence would help inform the analysis, OEA and Bureau/Office staff should identify this information as early as possible and solicit comment on the information in an NOI or NPRM.

Support predictive judgments and clearly address contrary data or predictions. To the extent that the economic analysis includes predictive judgments, it should provide support for those judgments. At the outset of a rulemaking, economists should determine whether there are studies or empirical evidence that would help inform the economic analysis of the proposed rule and of possible alternatives. Staff economists should work with Bureau/Office staff to include such information in the NOI or NPRM and should solicit comment on it. Where the FCC is giving greater weight to some empirical evidence/studies than to others, it should clearly state the reason(s) for doing so.⁶¹ To the extent that staff economists

⁶⁰ See, e.g., *Investment Company Institute v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013) (upholding agency's consideration of unquantified benefits, and observing that "the law does not require agencies to measure the immeasurable"); *Chamber of Commerce*, 412 F.3d at 142-43 (finding agency's informed conjecture as to benefits adequate under circumstances of the case); *FCC v. Fox Television Stations*, 556 U.S. 502, 519-20 (2009) (FCC was not required empirically to support conclusions about harmful effect of profanity on children given that subject matter defies quantification).

⁶¹ See *Business Roundtable v. SEC*, 647 F.3d 1144, 1150-51 (D.C. Cir. 2011) (agency insufficiently explained why it rejected certain studies submitted by commenters and relied on other, heavily criticized studies).

believe that a study or comment should be discounted, the release should explain why and cite available evidence supporting that position.

Candor regarding uncertainty and assumptions. Where there are limitations in quantifying costs and benefits, the Commission should be transparent about those limitations. Where certain benefits or costs cannot be monetized, the NOI or NPRM should present any available quantitative information: for example, quantification of the size of the market(s) affected, or the number and size of market participants subject to the rule. An analysis should be explicit about any underlying assumptions. Where alternative assumptions are plausible, the analysis should consider those alternatives. Imperfect data will not excuse the Commission from attempting to analyze a proposed rule: Courts have faulted the Commission and other agencies for failing to quantify anticipated costs and benefits, even where the available data is imperfect and where doing so may require using estimates (including ranges of potential impact) and extrapolating from analogous situations.⁶²

Compliance with applicable quality standards for regulatory analysis. The Commission's data-driven rulemaking should rely on high-quality and reliable analysis. Accordingly, the analysis produced by OEA, along with the initiating Bureaus and Offices, should meet the highest standards of RIA. This analysis should be based on the best reasonably obtainable scientific, technical, and economic information available. It must also meet the quality standards established by Commission and government-wide guidelines.⁶³

III. Enhanced Integration of Economic Analysis into the Commission's Work

To be most useful as a tool, regulatory impact analysis should begin at the earliest stages of a regulatory initiative and continue through its conclusion. Thus, where practicable, an NPRM should be informed by, and its text should incorporate the major points of, an RIA. The NPRM should also include questions designed to elicit comments and data that could improve the analysis. Where a rulemaking proceeding begins with an NOI, a full RIA may be premature at that stage, but the NOI should include a discussion of the approach that RIA may take and requests for appropriate data. Finally, the Report and Order should discuss all relevant comments and refine or confirm the RIA included in the NPRM as appropriate.

Bureaus and Offices should, to the extent practicable, coordinate with OEA in the early stages of all Commission-level and major Bureau-level proceedings that are likely to draw scrutiny due to their economic impact. Such coordination will help promote productive communication and avoid delays from the need to incorporate additional analysis or other content late in the drafting process. In the earliest stages of the rulemaking process, economists and related staff will work with programmatic staff to help frame key questions, which may include drafting options memos with the lead Bureau or Office. At other

⁶² This is particularly so where comments in the record have criticized the agency's subjective conclusions and proposed data sources or empirical methodologies. *See, e.g., U.S. Telecom Association v. FCC*, 359 F.3d 554, 568-71 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004) (generalizations about impairment to entry insufficient in the absence of cost data and analysis); *ALLTEL*, 838 F.2d at 558-59; *NARUC*, 737 F.2d at 1125-27; *Chamber of Commerce*, 412 F.3d at 143-44.

⁶³ Data Quality Act, Pub. L. No. 106-554 (2001), codified at 44 U.S.C. § 3516 note. In relevant part, the Data Quality Act required OMB to issue guidelines that would "ensur[e] and maximize[e] the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." In furtherance of this statutory mandate, OMB thereafter issued guidelines which, in turn, required each federal agency to publish its own data quality guidelines. *See* 67 Fed. Reg. 8452 (2002). The Commission's guidelines are published in Information Quality Guidelines, 17 FCC Rcd 19890 (2002).

formative stages, OEA will help perform RIA, such as cost-benefit analysis of the options under consideration.

To coordinate items at all stages, OEA will dedicate to each Bureau/Office: (1) a practice group leader, usually a Deputy or Associate Chief in the OEA Front Office, and (2) a manager who will oversee OEA staff working to support that Bureau/Office, usually a Deputy or Associate Division Chief in OEA's Economic Analysis Division. Bureaus and Offices may wish to dedicate a contact point/coordinator in each Front Office to ensure active communication with OEA. Dedicated contacts will help everyone involved in projects stay up to date.

When preparatory work on a Commission-level or major Bureau-level proceeding is initiated, Bureau/Office coordinators should contact the appropriate OEA Deputy/Associate Office Chief, the Economic Analysis Division Chief, and the relevant Economic Analysis Division Deputy/Associate Chief. For most major proceedings, this would be at the start of discussions leading to an options memo. OEA will work with the Bureau/Office to determine the extent to which OEA involvement is required, and coordinate with the Bureau/Office drafting team. Bureaus/Offices may consider consulting with OEA during their quarterly planning process for advanced discussion about OEA involvement in future proceedings.

OEA involvement will vary by proceeding—it may have minimal involvement in some proceedings, serve a largely advisory role in others, and have an active drafting role in proceedings with large economic components. OEA, in coordination with the relevant Bureau/Office, will make that assessment and inform the Bureau/Office as quickly as possible. If a proceeding requires input from multiple divisions within OEA (e.g., if a proceeding needs consultation from both the Auctions and Economic Analysis Divisions), OEA will manage the inter-division coordination. In many cases OEA involvement will include “big picture” framing of key issues, to be followed by other elements of regulatory impact analysis, such as cost-benefit analysis, as well as ensuring the correct use of economic terminology. When OEA reviews documents, edits will only be for material content and not writing style. In some cases, OEA may draft targeted sections of documents, in close coordination with the Bureau/Office. Bureaus/Offices should build time for OEA review into drafting schedules. The time required for review will depend on the amount of economic analysis involved in each item. OEA will work with Bureaus/Offices to develop processes that can run concurrently with other key activities. This process should be easier when early coordination occurs. In the event a Bureau/Office has concerns about the nature or extent of OEA involvement in a proceeding, those concerns should be raised with the Chief of OEA.

Comment Review Process. Even if OEA involvement was not deemed necessary at a formative stage (e.g., NOI, NPRM), the initiating Bureau/Office should consult with OEA before additional steps are taken (e.g., development of an R&O options memo based on comment record), to allow OEA to assess whether the record includes relevant economic evidence. It is incumbent upon the lead Bureau/Office, as the owner of the proceeding, to ensure that OEA is consulted as necessary, to avoid delays from incorporating additional analysis or other content late in the drafting process.

Circulation/White Copy. Prior to circulation of an NOI, NPRM, Report and Order, or other item with potentially significant economic impacts, Bureau/Office legal advisors and/or OEA coordinators should confirm OEA sign-off on the draft and include any OEA comments with the cover memo. In most cases the email will come from the practice group leader in the Economic Analysis Division, after coordination with the Economic Analysis Division Chief and the OEA front office. Through the cover memo, OEA will provide input to the Chairman and all Commissioners' offices, to include a formal acknowledgement that the item has been reviewed and a check-off regarding the economic issues (or lack thereof) presented in the item. In certain cases, OEA will also provide a separate non-public memo

directly to the Chairman and all Commissioners' offices to outline OEA's assessment of the document, and any concerns it may have. In such cases, the relevant Bureau or Office, as well as the Office of General Counsel, will be provided with the proposed memo with sufficient time to coordinate with OEA.