In Search of the Public Interest: Methodological Appendix

Jodi Short[†]

This is the Methodological Appendix to *In Search of the Public Interest*, 40 YALE J. ON REGUL. 759 (2023). The Article examines how four administrative agencies have interpreted "public interest" statutory delegations in adjudications from the early twentieth century to the present. This Appendix first describes how the study sample was constructed, then describes the coding methodology.

I. Case Selection Methodology 2
A. Interstate Commerce Commission Cases 2
B. Federal Communications Commission Cases 2
C. Federal Energy Regulatory Commission Cases 3
D. California State Water Resources Control Board Cases 3
II. Coding Methodology 4
A. ICC Codebook 4
1. Public Interest Definitions 4
2. Scope of Discretion 5
3. Public Interest Justifications 5
B. FCC Codebook: 7
1. Public Interest Definitions 7
2. Scope of Discretion 8
3. Public Interest Justifications 8
C. FERC Codebook 10
1. Public Interest Definitions 10
2. Scope of Discretion 11
3. Public Interest Justifications 12
D. California Water Board Codebook 13
1. Public Interest Definitions 13
2. Scope of Discretion 15
3. Public Interest Justifications 15

† The Honorable Roger J. Traynor Professor of Law, University of California College of the Law, San Francisco.

I. Case Selection Methodology

A. Interstate Commerce Commission Cases

I collected a sample of Interstate Commerce Commission (ICC) and Surface Transportation Board (STB) cases adjudicating consolidation applications under the Interstate Commerce Act. I included only consolidations involving two or more Class I railroads—the largest railroads by revenue thresholds established by regulation—because these are the most significant transactions and thus are likely to be more contested than smaller transactions and to generate the most thorough and searching consideration of the public interest. I excluded cases involving intrafamily mergers of subsidiaries into corporate parents, for the same reason. My sample contains thirty-five (35) adjudications that occurred between 1923 and 1999.

B. Federal Communications Commission Cases

I collected a sample of Federal Communications Commission (FCC) cases adjudicating merger applications under the Communications Act. The sample consists primarily of cases adjudicated under Section 310 of the Communications Act (or jointly under Sections 310 and 214), because few modern mergers involve exclusively wireline transactions.[1] However, because electromagnetic-spectrum mergers were rare in the Act's early days, I included major wireline mergers reviewed under Section 214 between 1940 and 1970.[2] Although the language of these two sections differs slightly, they have been interpreted to impose identical public interest requirements.[3] I utilized a variety of strategies to ensure inclusion of cases with substantive discussions of the public interest standard. Among transactions since 2000, I focused on those that the FCC characterizes as "major transaction decisions."[4] A transaction is designated as "major" if it presents "novel or complex issues of law or policy, proposes a combination of companies that is likely to have a significant impact on the public or involves issues that are likely to elicit significant public comment."[5] Such cases are the most likely to include substantive discussions of the meaning of the

1. Cases were collected from Westlaw's FCC database using the following search terms: advanced: (310 /5 "communications act") & (ATLEAST5("public interest")) & merger. Sample collection was completed on September 1, 2020.

2. Cases were collected from Westlaw's FCC database using the following search terms: advanced: (214 /5 "communications act") & (ATLEAST5("public interest")) & merger. Sample collection was completed on September 2, 2020.

3. Western Union Div. v. United States, 87 F. Supp. 324, 335 (1949), *aff'd*, 338 U.S. 864 (1949); *see also* Wash. Utilities & Transp. Comm'n. v. FCC, 513 F.2d 1142, 1147 (9th Cir. 1975); FCC v. RCA Commc'ns, Inc., 346 U.S. 86, 93-95 (1953).

4. Cases were collected from Westlaw's FCC database using the following search terms to identify major transaction decisions: adv: ("47 U.S.C. 310(d)" & ATLEAST5("public interest")) & "public notice" & PR(FCC) & PR (memorandum). Sample collection was completed on July 6, 2020.

5. *Overview of the FCC's Review of Significant Transactions*, FED. COMMC'NS COMM'N (July 10, 2014), https://www.fcc.gov/reports-research/guides/review-of-significant-transactions [https://perma.cc/8MVZ-FEPV] (last visited Sept. 3, 2020).

public interest standard rather than pro forma applications. Because earlier cases are not designated as major or minor, I utilized a variety of strategies to identify the most relevant cases. I included only cases decided by the full Commission, not those decided by administrative law judges or Bureau Chiefs acting under delegated authority. Second, I reviewed the cases to identify those that contained meaningful discussion of the Communications Act's public interest standard in the context of merger review.[6] This methodology yielded a sample of sixty (60) cases decided between 1943 and 2019.

C. Federal Energy Regulatory Commission Cases

I collected Federal Energy Regulatory Commission (FERC) cases adjudicating merger applications under these statutory provisions. I included in my sample cases that applied Section 203 of the Federal Water Power Act to adjudicate merger applications.[7] The sample includes all such cases decided prior to December 18, 1996, when the Commission adopted the *Merger Policy Statement* systematizing the relevant factors for public interest merger review. Post-*Policy Statement* cases are numerous and, predictably, are quite uniform in their application of factors determining the public interest. Consequently, I omitted roughly 2/3 of the cases identified by my Westlaw search based on a random sampling strategy.[8] This yielded a sample of ninety-four (94) cases between 1937 and 2020.

D. California State Water Resources Control Board Cases

I began collecting California State Water Resources Control Board Cases before they had been fully digitized, so I initially identified cases containing significant analysis of public interest questions by reviewing case annotations in the California Digest of State Water Board Decisions. I subsequently conducted searches in Westlaw for cases referencing California Water Code Section 1257 and using the term "public interest" more than five times. This yielded a sample of eighty-seven (87) cases between 1927 and 2015.

6. Cases were collected from Westlaw's FCC database using the following search terms. To identify major transaction decisions, I searched: adv: ("47 U.S.C. 310(d)" & ATLEAST5("public interest")) & "public notice" & PR(FCC) & PR(memorandum). Sample collection was completed on July 6, 2020.

7. I collected these cases from Westlaw's FERC database using the following search terms: "advanced: (203 /5 "federal power act") & (ATLEAST5("public interest")) & merger." Sample collection was completed on July 6, 2020.

8. I selected odd-numbered cases retrieved by the search terms indicated above, as organized in Westlaw by "date." When an odd-numbered case did not meet the overall selection criteria, I selected the next qualifying even numbered case. I excluded cases that were not decisions on merger applications, but rather policy statements, notices of proposed rulemaking, or decisions on procedural motions. I then omitted every other case on this list.

II. Coding Methodology

Each of the sample cases was coded for: (1) explicit definitions of the public interest stated by the agency; (2) explicit claims made by the agency about the scope of its discretion under the public interest standard; (3) justifications made by parties and agencies about why a particular outcome is (or is not) in the public interest; (4) the agency's treatment of these public interest justifications (i.e. whether it accepted, rejected, or raised them). The coding process was emergent, meaning that I started with a core outline of codes that I expected to find in the cases and added new codes as they were identified through my analysis of the cases. I kept a running outline of codes (a "codebook") that was applied consistently by me and my research assistants in analyzing the cases.

The codebooks applied in each of the four contexts are reproduced below. A code was applied no more than once in any given case to which it applied to avoid overcounting the prevalence of justifications in cases where many parties raised similar arguments. The codebooks below represent the raw codes applied to documents in the sample. During subsequent analysis, codes were organized into categories reflecting patterns as reported in the Article (such as statutory values or non-statutory values).

A. ICC Codebook

1. Public Interest Definitions

These codes reflect explicit statements by the agency about the values or considerations that inform its public interest analysis.

- Adequacy of transportation service
- Allowing railroads to fail
- Antitrust considerations
- Best use of transportation facilities
- Beyond private interests
- Coal transport
- Community interests
- Competition
- Conditions imposed on transaction would be in the public interest
- Consideration of opposing views
- Consistency standard (rather than higher affirmative benefits bar)
- Consistency with ICC's General Policy Statement
- Cooperation with states
- Cost-benefit balancing
- Economy and efficiency of transportation service
- Efficiency considerations more important than community considerations

- Employee interests
- Environmental impacts of the transaction
- Essential services (ability to maintain following the transaction)
- Fair wages and working conditions
- Harms of competition
- Holistic consideration of larger consolidation scheme
- Impact of transaction on shippers and consumers
- Impact of transaction on stockholders
- Impact of transaction on total fixed chargers of merging carriers
- Inclusion of other railroads
- Long-term impacts of transaction
- Lower costs
- Market discipline preferable to government regulation
- Modernization of rail system
- National transportation policy
- Public interest standard distinct from antitrust law
- Policies underlying Interstate Commerce Act
- Preserve transportation system to meet U.S. needs
- Rationalize rail system
- Reasonableness of rates following merger
- Safety impacts of merger
- Service improvement
- Sound economic conditions in transportation and among all carriers

2. Scope of Discretion

These codes are applied when the agency explicitly characterizes the scope of its discretion under the public interest standard in one of the following ways:

- The agency claims that the public interest standard gives it broad discretion.
- The agency claims that it is constrained in the exercise of its discretion by case law.
- The agency claims that it is constrained in the exercise of its discretion by statute.

3. Public Interest Justifications

These codes reflect the types of arguments made by the agency, by the parties to the proposed transaction, or by intervening parties about why the proposed transaction is (or is not) in the public interest. Each justification was coded for: the substance of the argument; the valence of the argument (i.e. whether it was made in support of or in opposition to the proposed transaction);

the agency's response to the argument (accepted, rejected, or raised by the agency); and the identity of the party or parties that made the argument.

- Substantive, non-efficiency values
    - Community impacts
        - Impacts on the local economy
        - Loss of service
        - National defense
        - Environmental impacts
        - Labor impacts
        - Railroad viability
- Efficiency arguments
    - Benefits to consumers
    - Capital investment
    - Competition
    - Cost-benefit analysis
    - Costs
    - Fixed charges
    - Growth
    - Price
    - Revenue
    - Service
    - Stockholder value
    - U.S. competitiveness
- Procedural arguments
    - Accommodation (arguments relating to whether merger proponents made concessions to objecting intervenors)
    - Buy-in (arguments relating to whether other stakeholders support the proposed transaction)
    - Due Process objection
    - Extensive processes have been observed
    - Lack of objections to the proposed transaction
    - Stakeholder engagement by merger proponents
- Viability arguments: Arguments about the proposed transaction's impact on the survival of applicant railroads, competing railroads, or the railroad industry.

Each coded justification was also coded for:

- Valence (whether it was made in support of or in opposition to the proposed transaction)

- Agency response (whether it was accepted, rejected, or raised by the agency)
- Parties making justifications:
    - Applicant/Target railroad
    - Competitor railroad
    - Chamber of Commerce
    - Government (local, state, or federal)
    - ICC Public Counsel
    - Non-governmental organization
    - Shippers
    - Stockholders
    - Union

B. FCC Codebook:

1. Public Interest Definitions

These codes reflect explicit statements by the agency about the values or considerations that inform its public interest analysis.

- Accommodation of other federal policies
- Applicant qualifications
    - Character
    - Technical/Financial
- Broad aims of the Communications Act
    - Access
    - Competition
    - Deregulatory aims
    - Diversity
    - Localism
    - Service development
    - Service quality
    - Specific purpose of Communications Act provisions
- Broadcast asset resale consistent with the public interest
- Caution about major shifts in policy
- Community/listener needs
- Conditions may be imposed in the public interest
- Cost-benefit balancing
- Deference to national security concerns
- Employment impacts
- Public v. private ownership issues excluded from public interest analysis
- Financial soundness of merged entity

- First Amendment considerations
- Free transfer of interests
- Improve structure and operation of broadcast industry
- Industry trends
- Innovation
- Integrity of broadcast system
- Integrity of news functions
- Intrastate service issues excluded from public interest analysis
- Local radio ownership policy
- Long term impacts
- Network broadcasting
- Public interest standard distinct from antitrust law
- Spectrum availability
- Two-part test
- 1992 Horizontal Merger Guidelines

2. Scope of Discretion

These codes are applied when the agency explicitly characterizes the scope of its discretion under the public interest standard in one of the following ways:

- The agency claims that the public interest standard gives it broad discretion.
- The agency claims that it is constrained in the exercise of its discretion by case law.
- The agency claims that it is constrained in the exercise of its discretion by statute.

3. Public Interest Justifications

These codes reflect the types of arguments made by the agency, by the parties to the proposed transaction, or by intervening parties about why the proposed transaction is (or is not) in the public interest. Each justification was coded for: the substance of the argument; the valence of the argument (i.e. whether it was made in support of or in opposition to the proposed transaction); the agency's response to the argument (accepted, rejected, or raised by the agency); and the identity of the party or parties that made the argument.

- Substantive, non-efficiency values
    - Applicant qualifications
        - Anti-competitive conduct
        - Children's programming
        - Discrimination

        - Financial qualifications
        - Illegal conduct
        - Insufficient expertise
        - Misrepresentation
        - Pornography
        - Speculative behavior
        - Community impacts
    - Access to 911 emergency service
    - Access to telecommunications services
        - Low-income areas
        - Residential customers
        - Rural areas
        - Tribal areas
    - Applicant's commitment to public service
        - Educational programming
        - Local content
        - News and public affairs programming
    - Content diversity
    - Employment impacts
    - Integrity of news functions
    - National security
        - Cybersecurity
        - Foreign investments/ownership
        - Surveillance
        - Wartime service provision
- Other substantive values
    - Concentration of corporate power
    - Discrimination/Diversity
    - Firm survival
- Efficiency arguments
    - Competition
    - Costs
    - Economies of scale
    - Innovation
    - Privatization
    - Rates
    - Resource development
    - Service enhancement
- Procedural arguments
    - Accommodation (arguments relating to whether merger proponents made concessions to objecting intervenors)
    - Adequacy of process

  - Buy-in (arguments relating to whether other stakeholders support the proposed transaction)
  - Compliance with local ownership rules
  - Compliance with DOJ consent decree
  - Compliance with license conditions
  - Extensive processes have been observed
  - Lack of objections to the proposed transaction
  - Outcome depends on parallel pending proceeding
  - Merger would frustrate regulation
  - Stakeholder engagement by merger proponents
  - Widespread opposition

Each coded justification was also coded for:

- Valence (whether it was made in support of or in opposition to the proposed transaction)
- Agency response (whether it was accepted, rejected, or raised by the agency)
- Parties making justifications:
  - Applicant
  - Civil rights interest group
  - Competitor
  - Consumer advocacy interest group
  - Fair media interest group
  - FCC Bureau
  - Government (local, state, federal)
  - Individual
  - International NGO
  - Legislator
  - Industry organizations and associations
  - Other private corporations
  - Religious interest group
  - Shareholder
  - Union

C. FERC Codebook

1. Public Interest Definitions

These codes reflect explicit statements by the agency about the values or considerations that inform its public interest analysis.

- Appropriate accounting treatment of transaction
- Legitimacy of affiliate transactions

- Affirmative benefit to public must be shown
- Antitrust considerations relevant but not determinative
- Applicant financial structure
- Cost-benefit balancing
- Broad statutory Purposes
- Coercion
- Commonwealth test
- Ability to provide comparable transmission services
- Compatibility
- Competition
- Conditions
- Consistent with law
- Consumer benefits
- Coordination of operating facilities
- Cross-subsidization
- Democratic approval
- Economical service
- Effects on regulation
- Enumerated factors
- Evolving standard
- Facilities integration
- Higher bar for some mergers
- Individual interests
- Investor interests
- Legislative intent to curb public utility abuses
- Merger Policy Statement
- National Power Survey
- No detriment to public
- Operating costs and rate levels
- Political neutrality
- Public hearings required to determine public interest
- Fairness of purchase price
- Effect on rates
- Effect on service
- Utilization of Power Resources

2. Scope of Discretion

These codes are applied when the agency explicitly characterizes the scope of its discretion under the public interest standard in one of the following ways:

- The agency claims that the public interest standard gives it broad discretion.
- The agency claims that it is constrained in the exercise of its discretion by case law.
- The agency claims that it is constrained in the exercise of its discretion by statute.

3. Public Interest Justifications

These codes reflect the types of arguments made by the agency, by the parties to the proposed transaction, or by intervening parties about why the proposed transaction is (or is not) in the public interest. Each justification was coded for: the substance of the argument; the valence of the argument (i.e. whether it was made in support of or in opposition to the proposed transaction); the agency's response to the argument (accepted, rejected, or raised by the agency); and the identity of the party or parties that made the argument.

- Substantive, non-efficiency values
    - No cross-subsidization of other business units by utility
    - Environmental impacts
    - Simplification of corporate structure
    - Best utilization of power resources
    - Support in affected communities
    - Effect of merger on employees
    - Protect public utility systems
- Efficiency arguments
    - Competition
    - Cost-benefit balancing
    - Effects on consumers
    - Effects on rates
    - Effects on service
    - Cost savings
    - Economies of scale
    - Facilities integration
    - Voluntary assent to enter transaction
- Procedural arguments
    - Accommodation (arguments relating to whether merger proponents made concessions to objecting intervenors)
    - Buy-in (arguments relating to whether other stakeholders support the proposed transaction)
    - Lack of objections to the proposed transaction
    - Lack of transparency by applicants
    - State approval or denial of merger

- Statutory factors
    - Transaction financing: These justifications apply statutorily required factors to ensure the financial viability of the proposed transaction and its fairness to ratepayers.
        - Accounting treatment
        - Applicant financial condition
        - Increase in fixed charges
        - Investors
        - Purchase price
    - Effect of merger on regulation by state or federal regulators

Each coded justification was also coded for:

- Valence (whether it was made in support of or in opposition to the proposed transaction)
- Agency response (whether it was accepted, rejected, or raised by the agency)
    - Parties making justifications:
    - Applicant
    - Competitor
    - Customer
    - Consumer Organization
    - ISO/RTO
    - Government (state, local)
    - Market monitor
    - Non-governmental organizations
    - Staff counsel
    - Union

D. California Water Board Codebook

1. Public Interest Definitions

These codes reflect explicit statements by the agency about the values or considerations that inform its public interest analysis.

- Beneficial use of appropriated water required
- Project consistent with the California Environmental Quality Act (CEQA)
- Public interest entails environmental considerations beyond CEQA requirements
- Conditions (agency will impose conditions in the public interest)
- Consistent with State Water Plan
- Consistent with statutory priorities

- Consistent with statutory purposes
- Cost-benefit balancing (determining public interest entails balancing costs and benefits of the proposed diversion)
- Demand for water
- Democracy (approval of project by local voters)
- Diligence in completing proposed project
- Economic feasibility
- Environmental considerations
    - Aesthetic
    - Cumulative impacts
    - Protection of fish populations
    - Other
- Existing doctrine (public interest requires adherence to common law water rights doctrine)
- Existing doctrine (Public interest authority overrides common law priority rights)
- Future higher uses of water should be preserved
- Local planning and priorities should be respected
- Need for electric power
- Preserve value of investments in infrastructure
- Public interest presumption should be applied
- Public trust values must be considered
- Reasonable use/no waste requirement
- Recreation is a beneficial use of water in the public interest
- Stakeholder interests must be considered
- Statutory priorities:
    - Domestic and irrigation use
    - Municipalities
    - Other state government agencies
    - Power use higher than other industrial use
    - Public interest trumps statutory priorities
- Statutory purposes:
    - Best develop, conserve, and utilize appropriated water
    - Conservation
    - Cooperation with federal government
    - Development of water resources
    - Flood control
    - Hydro development
    - Water quality
    - Watershed protection
    - Wetlands preservation
- Vested rights should be protected

2. Scope of Discretion

These codes are applied when the agency explicitly characterizes the scope of its discretion under the public interest standard in one of the following ways:

- The agency claims that the public interest standard gives it broad discretion.
- The agency disavows discretion to make a requested decision.
- The agency claims that it is constrained in the exercise of its discretion by case law.
- The agency claims that it is constrained in the exercise of its discretion by statute.

3. Public Interest Justifications

These codes reflect the types of arguments made by the agency, by the parties to the proposed transaction, or by intervening parties about why the proposed transaction is (or is not) in the public interest. Each justification was coded for: the substance of the argument; the valence of the argument (i.e. whether it was made in support of or in opposition to the proposed transaction); the agency's response to the argument (accepted, rejected, or raised by the agency); and the identity of the party or parties that made the argument.

- Substantive, non-efficiency values
    - Environmental
        - Aesthetic
        - Air quality
        - CEQA
        - Conservation (water)
        - Cumulative environmental impacts
        - Ecosystem impacts
        - Flood control
        - Groundwater depletion
        - Noise concerns
        - Salinity encroachment
        - Scarcity of water
        - Water quality
        - Water recycling
        - Wetlands preservation
    - Community impacts
        - Impacts on cultural resources
        - Community support for the proposed diversion
        - Access to water for domestic use

        - Preserve future availability of water for the community
        - Water intended for local use
        - Impacts on community tax base
        - Community's need for power generation
        - Community's need for water supply
        - Promotion of orderly conflict resolution
        - Community interest in local recreation activities
    - Economic priorities (the Board indicates priority for water use by one of the listed economic sectors, as provided by statute)
        - Agriculture
        - Development
        - Energy production
        - Industrial use
        - Military
        - Mining
        - Municipal use
        - Recreation business
    - No harm (code is applied where argument is made that the proposed diversion would not result in any harm)
- Common-law doctrine
    - Appropriation rights
        - Availability of unappropriated water
        - Lapsed rights
        - Injury to vested rights
        - Unqualified right to appropriate
        - Use interference
    - Beneficial use
    - Public trust
    - Reasonable use
    - Riparian rights
    - State Water Plan
    - Waste
- Efficiency arguments
    - Costs of proposed diversion
    - Cost-benefit analysis
    - Efficient system operation
    - Financial feasibility of proposed project
    - Impact of proposed diversion on investment value of parties' assets
    - Opportunity costs of proposed diversion
- Procedural arguments

  - Accommodation (arguments relating to whether merger proponents made concessions to objecting intervenors)
  - Applicant misconduct disqualifies application
  - Buy-in (arguments relating to whether other stakeholders support the proposed transaction)
  - Extensive processes have been observed
  - Jurisdictional arguments
  - Just compensation arguments
  - Lack of objections to the proposed transaction
  - Pending applications affect decision
  - Preemption precludes decision
  - Protest withdrawal indicates support for application
  - Stakeholder engagement by applicant
  - Strong opposition to application
  - Technical procedural objections

Each coded justification was also coded for:

- Valence (whether it was made in support of or in opposition to the proposed transaction)
- Agency response (whether it was accepted, rejected, or raised by the agency)
- Parties making justifications:
  - Applicant
  - Environmental group
  - Government (local, state, federal)
- Individual
- Citizen group
- Mutual water company
- Private business
  - Agriculture
  - Construction/Development
  - Mining
  - Recreation
  - Other
- Special water district
- Tribal entity
- Utility