

Managing the FCC: Style, Substance, and Institutional Reform
Kathleen Q. Abernathy
Wilkinson, Barker, Knauer, LLP

I appreciate this opportunity to discuss Phil Weiser’s important and insightful paper detailing problems in the ways in which the Federal Communications Commission (“FCC” or “Commission”) conducts its business and ways in which its processes might be improved. Over the course of my career, I have been fortunate to observe the FCC from numerous perches, both inside and outside the agency, and have naturally developed opinions on the issues addressed in the paper. In this brief response, I first highlight important points Weiser makes that I believe warrant emphasis. I then note several caveats to Weiser’s analysis, drawn mostly from my experience as a Commissioner. Finally, in light of Weiser’s arguments and my own caveats, I offer thoughts on the most direct way in which the new Administration can work to pursue change at the FCC. Specifically, the Commission’s Chairman¹ and the individuals he places in pivotal positions wield great power over not only the agency’s substantive positions, but also its internal processes at all levels. If the Obama Administration wishes to remedy the problems Weiser identifies, it must recognize that the management styles of the next Chairman and any new Commissioners will matter *at least* as much as their policy views, and must make its selections accordingly.

I. Weiser’s Well-Taken Criticisms.

To begin with, I share many of Professor Weiser’s concerns, and agree with many of his prescriptions. For one thing, national communications policy objectives would be better served if the FCC were able to conceive, enunciate, and pursue a holistic policy framework rather than addressing issues on a case-by-case and sometimes ad-hoc basis. For reasons I address below, I

¹ In this response, I have used the term “Chairman” (and the pronouns “he” and “his”) for simplicity, and to reflect the Communications Act’s own masculine terminology. *See, e.g.*, 47 U.S.C. § 155. I of course do *not* use this language to suggest anything about the identity of the Commission’s next Chair.

am more skeptical than Weiser is about the degree to which the Commission can in fact control its own agenda. But this does not mean it should not try to do so. More and more, communications technologies are playing a central role in our economic activities, affecting education, energy consumption, health care, and other critical activities, underscoring the importance of holistic policymaking. Moreover, that importance is only heightened by the present economic crisis and increasing concerns regarding American competitiveness.

Weiser is also correct in observing that the FCC's decision-making, particularly in recent years, has often seemed driven by political considerations rather than by reasoned legal, economic, or technical analysis. The Commission's expert analysis should drive its policy choices – not the other way around. Yet, over the past several years, on issue after issue, it appears that staff economists and attorneys have been directed to produce analysis that supports a pre-established result, rather than to reach the results best supported by their analyses.² As a practitioner and a former Commissioner, I believe that the Commission can only be effective if the expert professional staff is permitted wide latitude to assess honestly the legal, technical, and economic issues, and to recommend actions based on that analysis. The Commissioners may not always agree with this analysis. Indeed, they not only are entitled, but should be *expected*, to probe and challenge the recommendations put before them. And, as political appointees, it is their responsibility to assess the political realities of various situations and factor those realities into the overall decision making process. But in virtually all cases, the Commission's policy-making activities can only be strengthened by the availability of independent staff analysis.

² See *Deception and Distrust: The Federal Communications Commission Under Chairman Kevin J. Martin: A Majority Staff Report Prepared for the Use of the Committee on Energy and Commerce, U.S. House of Representatives, 110th Congress* (December 2008).

I also agree that the Commission should expand efforts to produce and procure independent analysis of the economic and technical issues before it. To be sure, advocates before the Commission play a critical role in promoting sound decision-making. As a Commission staffer and as a Commissioner, I learned a great deal from the briefings I received from the legal, technological, and financial insights of the experts who came to advocate positions on behalf of companies, public interest groups, state governments, consumer advocates, and other parties.³ But the Commission should never let itself become dependent on the work of interested parties, and independent determinations must be rooted in independent analysis.

I would also second Weiser's criticism of the Commission's over-reliance on merger conditions (whether "voluntary" or otherwise) in recent years. The Commission has both a statutory obligation to review certain communications-related mergers, and the policy prerogative to impose certain conditions if those conditions are necessary to ensure that the transaction at issue is consistent with the public interest.⁴ Conditions are appropriate when the merger would give rise to harms that cannot be avoided other than through imposition of that condition – but *only in that circumstance*. Merger reviews should not be viewed as an opportunity to saddle providers with obligations unrelated to the merger, especially given that (by definition) their competitors will remain free from those obligations. Obligations not designed to remedy merger-specific harms should only be imposed through the rulemaking process, subject to notice, comment, and judicial review.

Finally, I agree wholeheartedly with Weiser's argument that the FCC must, at both the staff and Commissioner levels, expand working relationships with other governmental agencies

³ See, e.g., Kathleen Q. Abernathy, *My View From the Doorstep of FCC Change*, 54 FED. COMM. L. J. 199, 200, 217-19 (2002) ("My View").

⁴ See generally 47 U.S.C. §§ 214, 310(d).

both within and beyond our nation's borders. As a Commissioner, I was proud to chair the Federal-State Joint Board on Universal Service, which facilitated discussions among federal regulators, state regulators, and state consumer advocates on difficult USF-related issues. I was also gratified to participate in the 2002 International Telecommunication Union ("ITU") Plenipotentiary Conference and the 2003 ITU World Radiocommunications Conference, to chair the 2004 ITU Global Symposium for Regulators, and to meet with numerous foreign regulators, both in Washington and abroad, to discuss issues of mutual interest. Such coordination will become increasingly important as global interdependence becomes more and more pronounced.

II. A Few Caveats

I do, however, want to offer a note of caution about some aspects of Weiser's arguments, not because I disagree with his goals but because I believe those goals cannot be achieved without initially recognizing several crucial points.

First, it is critical that we avoid attributing to "the Commission" as an institution traits and actions more properly attributed to one or more specific Chairmen. Weiser devotes specific attention to three recent incidents that, he suggests, "underscore[] the institutional failings long cited by critics of the agency."⁵ The first involved a political compromise over the 700 MHz auction's "open access" requirement, which resulted in "rushed ... deliberation" and post-decision lobbying.⁶ The second involved alleged concealment of critical evidence by the FCC Chairman from other Commissioners.⁷ The third involved the attempted adoption of rules without sufficient opportunity for input by the public or the other Commissioners.⁸

⁵ See Weiser Draft at 5-9.

⁶ *Id.* at 5-6.

⁷ *Id.* at 6-7.

⁸ *Id.* at 7-9.

Weiser suggests that “[i]n all three cases..., the Commission treated the public as irrelevant to its institutional operation.”⁹ This is not so. In the three cases at issue, the particular Chairman running the institution – not the institution itself – adopted a management style that departed from the traditional processes used to resolve complex proceedings. Not all FCC Chairmen have acted in this fashion, and there is no reason to believe that any future FCC Chairmen will act this way. This fact is important because it illustrates that the problems Weiser cites were not the inevitable outgrowths of the Commission’s structure, but rather the avoidable products of specific managerial decisions. This distinction has important implications for those contemplating reform, as I discuss below.

Second, we must also recognize the important (and often frustrating) limits on the agency’s agenda-setting capabilities. As noted above, I agree with Weiser that the agency would be well served by a clear vision of the next Chairman’s objectives in key policy areas. These areas include broadband deployment, media ownership, spectrum management, universal service, and a host of others. But nobody should think that success in *setting* the agenda will guarantee that the agenda can be pursued consistently. In my experience, numerous factors inevitably intercede to disrupt even the Commission’s best-laid plans. To take the most obvious, the Commission is by design a multi-member body with members not hailing from the Chairman’s own political party. While the Chairman needs only a majority to function, it is nearly impossible to govern the agency long-term without substantial support from the minority Commissioners. The compromises required to ensure such support will necessarily complicate the Chairman’s efforts to pursue a pre-defined policy vision, and particularly so if the Chairman’s policy choices fall outside the consensual center.

⁹ *Id.* at 9.

Moreover, as Weiser recognizes, the appellate courts have been famously skeptical of the Commission's policy decisions, often remanding and/or vacating decisions and prompting years of litigation.¹⁰ This litigation severely hampers the agency's ability to plan multi-staged reform, because uncertainty over early decisions will inevitably distort or preclude efforts on subsequent actions. The role played by litigation is especially challenging because the Communications Act itself is badly out-of-date. Though comprehensively amended in 1996, the Act barely mentions the Internet, and fails to consider the challenges and opportunities posed by the tremendous development of services combining transmission and processing capabilities. This limitation presents any Chairman with a difficult choice between (1) an agenda that more faithfully reflects current realities but may run afoul of the statute and thus risks reversal or (2) one that is faithful to the statute but not to current technological and business realities.

Other governmental actors also circumscribe the Commission's ability to pursue a pre-established agenda. The Commission is a creature of Congress, and its priorities are always subject to amendment of the communications laws. Even shy of amendment, committees and individual legislators possess the power to refocus FCC priorities to more closely resemble their own. Most recently, Senator John D. Rockefeller and Representative Henry A. Waxman, who will lead the committees most responsible for communications issues in the 111th Congress, sent FCC Chairman Kevin Martin a letter "strongly urg[ing]" him to refrain from actions not explicitly required by law and to focus the Commission's attention on matters relating to the DTV transition.¹¹ Even the Executive Branch plays a role: Just weeks ago, acting under authority conferred by the Paperwork Reduction Act, the White House Office of Management and Budget

¹⁰ See Weiser at 1 (noting the Commission's "dreadful record on judicial review").

¹¹ Letter from Senator John D. Rockefeller and Representative Henry A. Waxman to Chairman Kevin J. Martin, FCC (Dec. 12, 2008).

disapproved a requirement adopted by the FCC, effectively overturning a Commission decision.¹²

Finally, agency agenda-setting is also disrupted by uncontrollable factors both welcome (e.g., technological change) and unwelcome (e.g., natural or man-made disasters). I have long argued that the Commission is poorly equipped to keep pace with technological advance.¹³ To take just one example, the Commission opened its first major inquiry into Internet Protocol-based services in 2004, and has yet to resolve even the most basic statutory issues posed in that proceeding, notwithstanding the fact that carriers and customers have widely implemented IP-based solutions. The fast pace of inherently unpredictable change should give us pause about the agency's ability to establish and pursue a holistic, long-term agenda. Likewise, it is nearly impossible to overstate the impact that tragedies such as the September 11 attacks and Hurricane Katrina had on the national policy agenda, both generally and with respect to the Commission specifically.

Third, even setting aside limitations on the FCC's agenda-setting powers, it is important to recognize the tension between long-term strategic planning, on the one hand, and evidence-based decision-making, on the other. Weiser advocates reliance on a "preset agenda"¹⁴ and urges the FCC to "act strategically" on both a "macro" and "micro" level,¹⁵ but he also stresses the importance of evidence-based outcomes grounded on independent Commission research and comprehensive data-collection.¹⁶ While these are both laudable objectives, they are not entirely compatible. A commitment to robust internal research and policy analysis is only commendable if that analysis might actually inform the Commission's decisions. Moreover, fact-

¹² See http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200802-3060-019.

¹³ See, e.g., *My View* at 217-19.

¹⁴ Weiser at 11.

¹⁵ *Id.*

¹⁶ *Id.* at 22-27.

finding and analysis take time –often more time than at first anticipated – meaning that sound decision-making may not always comport with a pre-established agenda. Thus, to the extent a Chairman is committed to evidence-based decision-making, he must relax his commitment to a pre-set agenda, and vice versa. In this regard, it is not enough to identify these two imperatives. The challenge the Chairman faces is to recognize the tension between them and to balance them, articulating and (mostly) adhering to a coherent vision while remaining flexible enough to adapt when relevant considerations or evidence warrant change.

III. Conclusions: The Power of the People

To the extent that future Presidents wish to effectuate the institutional agenda urged by Professor Weiser, the most important thing that they can do would be to appoint FCC Commissioners and Chairmen committed to the principles he describes. In this regard, the Commission is very similar to a business. Having worked in the private sector and served on corporate boards, I know how important it is to select Chief Executive Officers based not only on the candidate’s expertise in a particular field but also on his or her fundamental leadership style and other intangibles.

The Communications Act is notoriously circumspect regarding the Commission’s organization and management. It specifies only that the Chairman shall be designated by the President, shall “preside at all meetings and sessions of the Commission,” shall (with some exceptions) “represent the Commission in all matters relating to legislation and legislative report” and “in all matters requiring conferences or communications with other governmental officers, departments or agencies,” and – most important for present purposes – shall “generally ... coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission.”¹⁷ In short,

¹⁷ 47 U.S.C. § 155(a).

except with regard to specific functions left to “the Commission,” the Act affords the Chairman almost complete discretion over agency management. This fact highlights the huge discretion the Chairman exercises over substantive, procedural, and organizational issues, and the degree to which the agency relies on his judgment.

Of course, the Chairman cannot run the agency alone. Every Chairman has relied to varying degrees on personal staff, Bureau and Office Chiefs, as well as the other Commissioners. In my view, the most successful Chairmen have been those willing to empower these other individuals. A well-formed team can ensure that the goals Weiser sets out are addressed: That agency actions reflect a holistic agenda, that decisions are driven first and foremost by sound analysis, that input from private parties and other Commissioners is appropriately accounted for, and that the FCC works well with other entities within and outside the federal government. A strong team can also work to help the Chairman adhere to a long-term policy vision while improvising as necessary to respond to Congressional demands, court remands, and unexpected events of all sorts.

Discussions regarding prospective FCC Chairmen tend to focus on the policy views of the presumed candidates: Their writings and speeches, their past jobs, and even their off-the-cuff remarks become grist for the Washington gossip mill. Ultimately, though, Professor Weiser’s analysis and my own caveats suggest that the first and most important step toward a *Commission* more amenable to long-term strategic planning, independent staff analysis, openness, public involvement, and evidence-based decision-making is the appointment of a *Chairman* committed to those objectives. In this circumstance, at least, style may matter at least as much as substance.