

**That's the Question: Remembering Institutional Competencies in a New Era of Progressive FCC
Regulation**

by Kyle D. Dixon¹

A staple response to policy inquiries lobbed by hostile reporters, smug conference attendees and other tough interrogators is to say, simply: “That’s the question.” Then the respondent to the initial tough question begins to lay out the ingredients of an answer, often before having any real confidence that an answer can be cooked up. Most critically, this technique gives respondents a moment to catch their breath and – as they mouth what is “on the one hand” and “on the other” – think *hard* about what comes next.

As federal government stewardship of the economy again finds itself in the ascendancy,² communications policymakers would do well to adopt a similar technique with respect to imposing new requirements on broadband and other advanced information technologies. Where regulators articulate their policy goals or norms,³ they then should take a breath and consider the hard *institutional* question of whether these norms are best furthered by the FCC, other federal agencies, the states or by private actors. Yet the impulse at the FCC – immediately after the quasi-legislative, often messy and eleventh-hour negotiations over what a majority of commissioners believe is the right policy goal – is to plow forward with a prescription. This impulse conflates *norm generation* with *implementation of those norms*.

A useful illustration of this “rush to rule” is found in the FCC’s recent proceedings to develop a location mandate for E-911. In that case, the FCC identified the norm or policy goal, namely, the general

¹ Partner, Kamlet Shepherd & Reichert, LLP. Thanks to Adam Peters, Ray Gifford and Phil Weiser for their insightful input, dialogue and research assistance on these issues. The views herein are no one’s fault but mine, however.

² See, e.g., “Obama’s New New Deal,” *The Week* (Dec. 8, 2008); David Pierson, “Most Americans Favor Government Intervention in Economy,” *Los Angeles Times* (Dec. 11, 2008); Roy Mark, “Obama Calls for Broadband Initiative,” *eWeek* (Dec. 12, 2008); Robert L. Borosage, “A New Progressive Era?” *Huffingtonpost.com* (Oct. 28, 2008).

³ As discussed later, policymakers may elect to defer or otherwise delegate *norm-setting* functions to standard-setting bodies or other forms of private collaboration.

consensus in favor of providing public safety access points (PSAPs) better access to this information. But then, in an effort to implement this norm, the FCC relied on its usual rushed rulemaking and *ex parte* processes to adopt a prescriptive order. This prompted one commissioner to characterize the proceedings as “fraught with highly dubious legal and policy maneuvering that bypasses a still developing record on what should be the reasonable and approximate implementation details.”⁴ A little more than three months later, the FCC was pressured to stay the compliance date for that order.⁵

Of course, factors such as true “market failure” or imminent harm to health and safety sometimes make the FCC’s reluctance to pause between norm generation and implementation entirely prudent.⁶ For the most part, however, this approach is likely to risk missed opportunities to promote the FCC’s own goals more effectively.

The benefits of coaxing the FCC to look outside itself may be clearest with respect to the Federal Trade Commission (“FTC”), on the one hand, and industry or other private collaboration, on the other.⁷ A variety of factors suggest that both FTC involvement and private collaboration can be useful complements to FCC regulation of these services.⁸ Rapid evolution in markets and technology heighten the need for more regulatory flexibility and greater leverage of economic and engineering expertise beyond that within the FCC. Convergence continues to strain the Communications Act’s service-specific regulatory approach. And government at all levels faces an imperative (particularly during this economic downturn) to foster ongoing competition, innovation and investment by all participants in the

⁴ Statement of Commissioner Jonathan Adelstein, Wireless E911 Location Accuracy Requirements, PS Docket No. 07-114 et al., Report and Order (rel. Nov. 20, 2007) (available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519870631).

⁵ Wireless E911 Location Accuracy Requirements, PS Docket No. 07-114 et al., Order (rel. March 12, 2008) (available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-08-557A1.pdf).

⁶ See, e.g., *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order on Reconsideration, FCC 07-177 (rel. Oct. 4, 2007).

⁷ “Private collaboration” for the purposes of this essay includes a broad spectrum of self- and co-regulatory activities that might occur through standard-setting bodies, formal and informal industry consortia, or individual companies and organizations.

⁸ See Philip J. Weiser, *FCC Reform and the Future of Telecommunications Policy* (2009). Moreover, because the FTC has more experience and comfort with forms of private collaboration, its input could help to ensure that the FCC undertakes a more rigorous analysis before taking a prescriptive course of action.

Internet ecosystem. Greater attention to FTC coordination and private collaboration also would constitute a step toward reforming the FCC consistent with the transition to fully competitive communications markets, which Chairman Kennard foreshadowed in “A New Federal Communications Commission for the 21st Century.”⁹ Taking these salutary steps could therefore enhance the positive relationship between the federal government, industry organizations, and the public at large.

Despite the foregoing, there are several reasons why the FCC may continue to resist coordinating with the FTC and facilitating forms of private collaboration. For one, even in this era of deregulation, agencies still retain substantial authority to achieve multiple, often conflicting policy goals. Agencies therefore may face enormous pressure from Congress or from other parts or levels of government to intervene in private efforts. Moreover, agencies have an interest in self-preservation and thus can be expected, at times, to resist ceding their role to private decision-makers, even when the latter might accomplish the agency’s goal more effectively than the agency itself. Thus, to supplement the beneficial reforms Professor Weiser describes,¹⁰ this essay suggests ways of encouraging the FCC to further its aims by complementing its own activities with reliance on these other institutional mechanisms.

⁹ Federal Communications Commission, *A New Federal Communications Commission for the 21st Century* (Mar. 17, 1999) (available at <http://www.fcc.gov/Reports/fcc21.html>).

¹⁰ See Weiser, *FCC Reform and the Future of Telecommunications Policy* at 10-27. For

Toward Greater Coordination with and Reliance on the FTC

Much of the impetus behind FCC-FTC coordination grows, *inter alia*, from (1) the need to police anticompetitive behavior as the Communications Act and new technology permits companies to enter new markets; (2) the importance of consumer protection as competition in communications expands; and (3) historical jurisdictional challenges faced by both agencies.¹¹ The FTC possesses extensive resources and experience to complement those of the FCC in investigating and challenging both abuses of market power and potential consumer harms. With respect to jurisdiction, the FTC historically has been restricted from regulating “common carriers,” generally referred to as “telecommunications carriers” under the 1996 Act.¹² The FCC’s authority, while clearer generally, could face some uncertainty to the extent the courts impose limitations on its jurisdiction to regulate offerings that are classified as “information services” under the Act.¹³

Despite such complementary resources, the relationship between the FCC and FTC remains unclear with respect to oversight of broadband and other advanced services. Although FTC staff has been active in evaluating broadband market dynamics, for example, it is unclear what bearing (if any) such work does or should have on the FCC’s activities in the same area.¹⁴ Assuming that both the FCC and FTC will claim authority to regulate these offerings for the foreseeable future, the lack of clarity

¹¹ See Testimony of Philip J. Weiser, Broadband Competition Hearings, Federal Trade Commission (Feb. 14, 2007) (available at <http://www.ftc.gov/opp/workshops/broadband/presentations/weiser.pdf>) (discussing the important role the FTC can play in broadband oversight by encouraging disclosure and by punishing failure to comply with stated policies).

¹² See Federal Trade Commission, Testimony Before the Subcommittee on Competition, Foreign Commerce, and Infrastructure; Committee on Commerce, Science and Transportation, United States Senate (June 11, 2003) (available at <http://www.ftc.gov/os/2003/06/030611reauthsenate.htm>).

¹³ See *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) (“The FCC’s position seems to be that the adoption of rules mandating video description is permissible because Congress did not expressly foreclose the possibility. This is an entirely untenable position.”).

¹⁴ Compare Federal Trade Commission, *Broadband Connectivity Competition Policy*, Staff Report (June 2007) (available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>), with *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, FCC 08-183 (Aug. 20, 2008) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf) (“*FCC Network Management Decision*”).

between the agencies may waste precious opportunities to leverage each agency's resources and unique expertise, and may fail to give the public enough guidance on where to direct their concerns. The current situation also may create unnecessary openings for interested parties to "forum shop" and thereby potentially delay or complicate needed action.

Accordingly, the FCC's leadership in the new Administration would be well-advised to provide more public guidance regarding how the FCC and FTC will coordinate their oversight of broadband and other advanced service offerings. The specific form such guidance should take may depend on both fleeting concerns (*e.g.*, ensuring that staff at neither agency is too stretched to be effective given other regulatory priorities) and on more fundamental institutional concerns. With respect to the latter, the FCC should ask itself (after articulating its policy goals) why the FTC would not be better equipped to take the lead on issues for which the FTC has demonstrated a comparative advantage. These issues include policing market power and engaging in consumer protection and enforcement activities.¹⁵ The FCC also should question its superiority to the FTC to the extent there are questions regarding whether the FCC has "ancillary" or other authority to regulate.¹⁶ At a minimum, the FCC's coordination efforts should mirror the useful model provided in the memorandum of understanding between the FCC and FTC with respect to their joint "do-not-call" initiative.¹⁷ Important components of this model include (1) public announcement of the nature of the coordination; (2) minimum requirements regarding the

¹⁵ See generally Philip J. Weiser, *The Next Frontier for Network Neutrality*, 50 ADMIN. L. REV. 273 (2008); Concurring Statement of FTC Commissioner Jonathan Leibowitz Regarding the Staff Report: "Broadband Connectivity Competition Policy" (June 2007).

¹⁶ For example, the FCC could face serious questions to the extent it sought to impose strict, common carrier nondiscrimination requirements on broadband offerings it has previously classified as "information services" under the Act. The Commission has concluded that such nondiscrimination requirements are reserved for "telecommunications carriers" rather than providers of "information services." See *Nat'l Cable & Television Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005) ("[t]he Act regulates telecommunications carriers, but not information-service providers, as common carriers.").

¹⁷ Federal Trade Commission, *Annual Report to Congress for FY 2003 and 2004 Pursuant to the Do Not Call Implementation Act on Implementation of the National Do Not Call Registry*, Appendix (Sept. 2005) (available at <http://www.ftc.gov/reports/donotcall/051004dncfy0304.pdf>).

frequency of coordination; (3) a commitment to share information and to avoid duplicative enforcement; and (4) some effort to coordinate public pronouncements.

By making these kinds of improvements to its coordination with and reliance on FTC oversight of broadband and other advanced service offerings, the FCC would both minimize the downsides and maximize the upsides to consumers of the agencies' overlapping involvement in this area. This is not to deny the possible challenges of shared jurisdiction between the FCC and FTC. These include the risks that interagency coordination will degenerate into turf warfare or that such coordination will be controversial among other policymakers or industry leaders. Nevertheless, closer coordination between the two agencies acknowledges the likelihood that both the FCC and FTC will seek to oversee the development of these offerings, thereby converting a potential challenge for regulators into an opportunity to serve the public more effectively.

Encouraging FCC Deference to Private Collaboration

The FCC's new leadership could derive similar benefits from providing more guidance regarding its oversight of industry or other private collaboration intended to address broadband and related policy concerns. Several examples of such collaboration have operated or are currently operating in the broadband and Internet space, illustrating a variety of approaches.¹⁸

¹⁸ For example, Better Business Bureau OnLine (<http://www.bbbonline.org/>) is a certification program that awards "trustmarks" to businesses whose websites meet BBB's standards for truth in advertising, disclosure practices, and privacy and security. The Distributed Computing Industry Association (DCIA) (<http://www.dcia.info/>) engages in efforts to develop standards and best practices to advance distributed computing channels, including the P4P Working Group of ISPs, P2P distributors and researchers to define best practices for the use of P4P mechanisms. Family Online Safety Institute (FOSI) (<http://www.fosi.org/>) brings various stakeholders (*i.e.*, companies, educators, government and law enforcement officials, non-profits, and parents) in the Internet industry together to explore technological approaches to ensure online safety. The organization also promotes parental involvement and empowerment through its public events and education efforts. The Internet Engineering Task Force (IETF) (<http://www.ietf.org/>) engages network designers, operators, vendors and researchers concerned with the evolution of Internet architecture as the main forum in which technical standards are proposed, tested, and debated. The World-Wide Web Consortium (W3C) (<http://www.w3.org/>) develops transport and document standards for the Internet, including more than 40 technical specifications for Web-based text, audio, video, and graphics.

As with FCC-FTC coordination, the benefits of clarifying FCC oversight of private collaboration flow in part from an understanding of institutional competencies. Private actors often will possess more information than regulators regarding technology, consumer demand, business plans and other factors that may be relevant in developing the best solutions to policy problems. Thus, by providing guidance regarding where private action can help further the FCC's policy agenda, the agency can leverage such external expertise more effectively than in formal proceedings, where disparate parties face strong incentives to favor extreme positions over mutually-beneficial compromises. Clarifying the FCC's oversight of private collaboration also recognizes that consumer demand and technology will tend to evolve rapidly, thereby leaving gaps between the agency's pronouncements on specific issues and what may be needed as a practical matter.¹⁹ There may be other benefits. And given that the FCC would retain full authority and discretion regarding the regulation of broadband and other advanced services, the agency always could intervene in the event that private efforts turned inadequate or counterproductive.

Unlike the FTC, however, the FCC has given little concrete direction about whether and how such collaboration would be welcome complements to its regulatory efforts, as Professor Weiser and other commentators have noted.²⁰ Moreover, given the FCC's expansive authority and the inherent

¹⁹ Despite the adoption of an *Internet Policy Statement*, the FCC's attempts at norm generation in that area often have raised more questions than they have answered. See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Policy Statement*, FCC 05-151 (rel. Sept. 23, 2005). Although the FCC's recent network management decision reduced this ambiguity somewhat, it still leaves a sizeable gap between those policy goals the FCC has stated clearly and what network owners need on a day-to-day basis. See *FCC Network Management Decision* ¶ 1 (concluding that Comcast's previous practices with respect to peer-to-peer applications "unduly squelches the dynamic benefits of an open and accessible Internet and does not constitute reasonable network management"). Even had the FCC made broader conclusions regarding unacceptable approaches to network management, it is unlikely that it would have addressed all the relevant challenges facing network administrators, especially as network usage and the networks themselves evolve. Indeed, given such dynamism it seems unlikely that regulators ever could write a rule for every circumstances. Thus, some amount of private resolution of these matters (e.g. collaborative, voluntary, contractual, etc.) is inevitable.

²⁰ See, e.g., Philip J. Weiser, *Exploring Self Regulatory Strategies for Network Management*, Flatirons Summit on Information Policy (Aug. 25, 2008) at 23-24 (available at <http://www.silicon-flatirons.org/documents/publications/summits/WeiserNetworkManagement.pdf>); see also Robert Pitofsky, "Self-Regulation and Antitrust," Prepared Remarks for D.C. Bar Association Symposium (Feb. 18, 1998) (available at

uncertainty of its quasi-legislative decisionmaking process, the agency may inadvertently mute private incentives (ranging from “good corporate citizenship” to avoidance of regulation) to understand and further its policy goals.

How the FCC decides to structure its oversight of private collaboration may turn on the nature and scope of the policy issues involved. Private efforts to protect children from objectionable material online, for example, may call for very different oversight than efforts to develop “best practices” regarding network management. Oversight also may range from relatively close involvement (such as the “co-regulation” recently proposed by the British telecommunications regulator, Ofcom) to more arms-length “self-regulation.”²¹

As Professor Weiser has suggested, however, the FCC’s legacy of command-and-control regulation may mean that new forms of industry collaboration and co-regulation will be significantly underutilized.²² This may be true even to the extent the FCC provides more formal guidance regarding the appropriateness of private collaboration. Take, for instance, Ofcom’s recent statement on co- and self-regulation,²³ which would tailor oversight of private collaboration to the nature of the collaboration and the issues involved.²⁴

There is much to recommend Ofcom’s approach. It would acknowledge that beneficial private collaboration can take place even where regulators’ involvement is statutorily required.²⁵ Ofcom also gives useful guidance to industry regarding which traits of private collaboration are most likely to

<http://www.ftc.gov/speeches/pitofsky/self4.shtm>). Indeed, a related benefit of the clearer FCC-FTC coordination described above is that it would help the FCC leverage the FTC’s greater experience in overseeing private collaboration.

²¹ See Ofcom, *Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-Regulation* (Dec. 2008) (available at <http://ofcom.org.uk/consult/condocs/coregulation/statement/statement.pdf>) (“Ofcom Statement”). Ofcom defines co-regulation as a hybrid of traditional regulation and “pure” self-regulation that splits responsibility between industry and government, with the latter providing the legal backstop powers to secure desired policy objectives. *Id.* at 7.

²² Weiser, *FCC Reform and the Future of Telecommunications Policy* at 3.

²³ See generally Ofcom Statement.

²⁴ *Id.* at 7-10, 16-17.

²⁵ *Id.* at 7.

reassure regulators.²⁶ In addition, conducting a proceeding on the process and oversight of private collaboration could mitigate regulators' reluctance to rely on such collaboration as a mechanism to accomplish their policy goals, both by underscoring the benefits of private collaboration and by giving regulators more comfort that they can position themselves as an effective backstop if private collaboration begins to threaten those goals.

Given the FCC's command-and-control legacy, however, it seems unlikely that Ofcom's approach by itself would be enough to encourage the FCC to take full advantage of the many times when private collaboration can be helpful in achieving the agency's policy goals. For example, Ofcom's approach suggests regulators will ask themselves whether "the likely industry solution correspond[s] to the best interests of citizens and consumers."²⁷ But to the FCC – an agency that habitually decides what its goals are in the same breath as it imposes mandates to achieve those goals – the industry solution is seldom likely to be precisely what regulators would have prescribed. Thus, given its current culture, the FCC could find it difficult to conclude that industry solutions "correspond to the best interests of citizens and consumers ". Hence the importance of the FCC finding ways to distinguish between norm generation and norm implementation more clearly.

In the absence of statutory or other external constraints, the FCC's new leaders could maintain this distinction by applying some internal rule of thumb or other flexible standard by which the agency would consider the impact of industry collaboration on regulatory policy goals and thereby enhance the rationality and predictability of its decisions whether (or not) to intervene in such activities. The precise nature of this internal rule of thumb would require analysis beyond the constraints of this brief essay. One approach, however, might be to develop a rule of thumb analogous to the two-part standard of

²⁶ Specifically, Ofcom identifies the following as "good practices" for private collaboration: public awareness, transparency, significant participation by industry, adequate resource commitments, enforcement measures, audit of members and scheme, system of redress in place, involvement of independent members, regular review of objectives and aims, and non-collusive behavior. *Id.* at 22.

²⁷ *Id.* at 16.

judicial review adopted in *Chevron, USA v. Natural Resources Defense Council*.²⁸ In *Chevron*, the Supreme Court determined when and how courts should defer to agencies' legal interpretations in implementing their governing statutes, and when courts may interpret those statutes *de novo*. To oversimplify, step one of *Chevron* calls on courts to employ tools of statutory construction to determine whether a given statute is clear. In the event the statute in question is vague or ambiguous, step two of *Chevron* calls on the court to determine whether an agency's interpretation is reasonable, rather than "arbitrary and capricious."²⁹

Under the modified *Chevron* rule of thumb suggested here, FCC leaders would intervene in private collaboration only in one of two cases: (1) where the desired outcome of pursuing a policy goal is unambiguous and the agency perceives that collaborative efforts alone may not achieve this outcome; or (2) when the policy goal could be achieved by multiple outcomes or options but industry participants choose unreasonably among them. Part (1) of this rule of thumb provides a useful framework for FCC leaders to isolate and give relatively simplified treatment to situations in which an agency's previous decisions or its interpretation of its statutory mandates leads ineluctably to specific implementation tasks. In those situations, it makes little sense for the agency to allow industry collaboration to proceed down an independent path. Part (2) of this modified *Chevron* rule of thumb would give FCC leaders a framework for actually weighing options, balancing the pros and cons related to government supplanting or directing industry collaboration where the appropriate conclusion of such activities is not foregone. Part (2) suggests that an agency should remain indifferent as to the choice industry makes among several options that seem consistent with the agency's ambiguous policy.

There may be other, more effective means by which the FCC's new leaders can avoid shortchanging themselves or the public where private collaboration – especially private implementation of policy norms that the FCC itself has articulated – could be more effective than implementing those

²⁸ 467 U.S. 837 (1984).

²⁹ *Id.* at 843-44.

same norms via regulatory mandates. At a minimum, the FCC's new leadership would be well-advised to (1) identify those issues on which it actively encourages private collaboration (subject to antitrust or other applicable legal constraints); (2) re-double its efforts (formally and informally) to specify its policy goals in these areas; and (3) express its willingness to give industry and other interested parties some flexibility in designing ways to accomplish these policy goals.³⁰

Conclusion

As James DeLong has observed, solutions based purely on notions of "letting the free market do it" or "let's regulate it" may not provide a totally satisfactory answer to policy dilemmas in the Internet space.³¹ Instead, policymakers should explore new solutions that create incentives for meaningful give-and-take among government and private actors. In contrast to the command-and-control regulation noted by Professor Weiser, the appropriate solution could involve an iterative process based on contract, public commitment, and private collaboration.³²

Even in an era of heightened government economic involvement, the FCC's oversight of broadband and other advanced services likely will remain a productive arena for such iteration, especially given that the FCC's oversight will continue to co-exist in an environment of both FTC involvement and, where permitted, private collaboration. By "taking a breath" to consider how reliance on FTC coordination or private collaboration can complement the FCC's efforts, the agency's new leaders would raise the likelihood they will further their own policy goals.

³⁰ This is not to suggest that private collaboration cannot, under appropriate openness and due process constraints, also serve as a useful mechanism for fleshing out policy norms. See, e.g., Federal Trade Commission and the Department of Health and Human Services, *Perspectives on Marketing, Self-Regulation, and Childhood Obesity* (2006) (available at <http://www.ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCandHHSReportonJointWorkshop.pdf>). Given the persistent gap between regulators' pronouncements and practical business needs, private collaboration often will be able to move the norm generation ball forward in ways that do not undermine, and may further, regulators' policy goals.

³¹ James V. DeLong, *Avoiding a Tech Train Wreck*, *The American* (May/June 2008). Although DeLong was commenting primarily on private collaboration, much the same could be said about the give and take among administrative agencies.

³² *Id.*

