

FCC Reform and the Future of Telecommunications Policy

Philip J. Weiser*

“We are in danger of becoming prisoners of our own procedures in the administrative process.” Newton N. Minow, FCC Chair, 1961-63¹

The institutional failings of the FCC have finally begun to attract attention. For years, the agency tolerated a level of mystery and secrecy over what proposals would be submitted for consideration, an extraordinary reliance on the *ex parte* process at the expense of the formal notice-and-comment procedure, and a limited degree of collegial discussion among the Commissioners and the public. Of late, however, concerns about how the agency operates have become more pronounced and Congress has finally taken an interest in the question of whether and how to reform the FCC’s institutional processes. To that end, both House Commerce Committee Chair Emeritus John Dingell and Senate Commerce Committee Chair Jay Rockefeller have expressed serious concerns about how the agency operates,² the House Commerce Committee majority released a report citing serious failings in the operations of the agency,³ and law professor Lawrence Lessig has called for its abolition.⁴

In response to the Congressional interest in institutional reform, the soon-to-be former Chairman Kevin Martin has disclaimed the need for any legislative action, has adjusted some of the FCC’s operating procedures, and, in the main, has defended the agency on the ground that his tactics are similar to those of his predecessors.⁵ Whether or not Martin’s management style is

* Professor of Law and Telecommunications, University of Colorado at Boulder. Thanks to the Ford Foundation for a grant to support this research and to Dan McCormick on first rate research assistance as well as to Mark Cooper, Pierre de Vries, Kyle Dixon, Ray Gifford, Dale Hatfield, Mike Marcus, Jonathan Nuechterlein, Adam Peters, Jonathan Sallet, Cathy Sharkey, Jim Speta, and Joe Waz for valuable comments and encouragement.

¹ Newton Minow, *Suggestions for Improvement of the Administrative Process*, 15 ADMIN. L. REV. 146, 153 (1963).

² Letter from John D. Dingell, Chairman, House Comm. on Energy and Commerce, to Kevin J. Martin, Chairman, Fed. Commc’ns Comm. (Dec. 3, 2007), *available at* http://energycommerce.house.gov/Press_110/110-ltr.120307.FCC.Martin.transparency.pdf (“Given several events and proceedings over the past year, I am rapidly losing confidence that the Commission has been conducting its affairs in an appropriate manner.”); Ted Hearn, *Watching the Martin Watch*, MULTICHANNELNEWS, Jan. 21, 2008, <http://www.multichannel.com/article/CA6524092.html> (calling on the Senate to evaluate the “structure of the agency, its mission, the terms of the commissioners, and how to make the agency a better regulator, advocate for consumers, and a better resource for Congress”).

³ COMMITTEE ON ENERGY AND COMMERCE MAJORITY STAFF REPORT, DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J.MARTIN (December 2008), <http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc%20majority%20staff%20report%20081209.pdf> [hereinafter, DECEPTION AND DISTRUST].

⁴ Lawrence Lessig, *Reboot the FCC*, NEWSWEEK.COM, December 23, 2003, <http://www.newsweek.com/id/176809>.

⁵ John Eggerton, *Martin: FCC Doesn’t Need Major Reform*, BROADCASTING & CABLE, Jan. 15, 2008, <http://www.broadcastingcable.com/article/CA6522942.html> (quoting Martin as stating that “[i]n general, our processes aren’t any different than they were under previous chairmen both Republican and Democrat.”). Some longtime agency observers essentially second Martin’s judgment, noting that “[t]he FCC needs to reform and it has needed to for 25 years. . . Too much is done behind closed doors secretly and it has been that way through Democratic and Republican leadership.” Cecilia Kang, *FCC Chair Abused Power, House Probe Finds*, WASHINGTON POST, December 12, 2008, at D1, http://www.washingtonpost.com/wp-dyn/content/article/2008/12/09/AR2008120903132_pf.html (quoting Consumer Union’s Gene Kimmelman).

different from past agency Chairs, the great weight of opinion is that the FCC has always operated in a suboptimal fashion and is in dire need of institutional reform. As former Commissioner Glen Robinson noted over forty years ago: “[f]ew agencies of Government have been so doggedly pursued by critics as the FCC.”⁶ Former Chairman Reed Hundt added his own damning observation: that the agency suffers from a perennial “reputation for agency capture by special interests, mind-boggling delay, internal strife, lack of competence, and a dreadful record on judicial review.”⁷ In short, the question is not whether to reform how the agency operates, but how to do so.

As new leadership moves to take the reins at the FCC, it is an opportune moment to re-evaluate the agency’s institutional processes. In confronting the challenges facing the agency, the new leadership should not make the mistake of focusing solely on the substantive issues begging for attention—spectrum policy reform, network neutrality, and universal service policy to name a few. Rather, it should also take stock of its institutional processes, as they fundamentally shape the ability of the agency to be an effective regulator in the public interest.⁸ In short, the agency’s current lack of data-driven decision-making and emphasis on political dealing hinders the thoughtfulness of its analysis, limits its ability to address issues effectively, and invites a cynical attitude toward government.⁹ Unfortunately, legal scholars have not done their part to address the institutional failings of the FCC (and other administrative agencies, for that matter), glossing over the importance of institutional processes in favor of substantive policy analysis and generally

⁶ Glen O. Robinson, *Radio Spectrum Regulation: The Administrative Process and the Problems of Institutional Reform*, 53 MINN. L. REV. 1179, 1239 (1969).

⁷ Reed E. Hundt & Gregory L. Rosston, *Communications Policy for 2006 and Beyond*, 58 FED. COMM. L.J. 1, 31 (2006).

⁸ In explaining his commitment to a serious evaluation of the Federal Trade Commission’s institutional processes (as part of an “FTC at 100” study), Chairman Bill Kovacic explained that “[t]he quality of institutional design, institutional infrastructure, and institutional process has a great deal to do with determining the quality of substantive outcomes. The same energy that’s dedicated to asking what’s the right doctrine or what’s the right conceptual framework has to be applied to questions concerning optimal institutional design and operational arrangements.” *Interview with William E. Kovacic, Chairman, Federal Trade Commission*, ANTITRUST SOURCE 1 (August 2008), <http://www.ftc.gov/speeches/kovacic/2008kovacicintrvwc.pdf>.

⁹ Jim Puzzanghera, *Criticism of the FCC’s Chairman is Widely Aired*, L.A. TIMES, Dec. 10, 2007, at C1 (“Critics have complained that important issues – such as the 2009 transition to digital television and reforming a fund that subsidizes phone and Internet service for low-income and rural residents – are taking a back seat to bickering.”). The often cavalier attitude toward regulation was described and bemoaned by Judge Posner as follows:

There has I think been a tendency of recent Administrations, both Republican and Democratic but especially the former, not to take regulation very seriously. This tendency expresses itself in deep cuts in staff and in the appointment of regulatory administrators who are either political hacks or are ideologically opposed to regulation. (I have long thought it troublesome that Alan Greenspan was a follower of Ayn Rand.) This would be fine if zero regulation were the social desideratum, but it is not. The correct approach is to carve down regulation to the optimal level but then finance and staff and enforce the remaining regulatory duties competently and in good faith. Judging by the number of scandals in recent years involving the regulation of health, safety, and the environment, this is not being done.

Richard Posner, *Re-Regulate Financial Markets?*, THE BECKER-POSNER BLOG, Apr. 28, 2008, http://www.becker-posner-blog.com/archives/2008/04/reregulate_fina.html.

focusing on the purely legal issues of administrative law as opposed to the actual operations of administrative agencies.¹⁰

This Article proceeds in five parts. Part I briefly describes the longstanding criticisms of how the FCC operates, highlighting a few recent episodes that have drawn attention to the need for institutional reform. Part II discusses the opportunity for the FCC to adopt a new institutional strategy for telecommunications policymaking, emphasizing the importance of strategic agenda setting and transparency. Part III explains how the agency can use its policymaking tools—rulemaking, adjudication, and merger review—more effectively. Part IV underscores the opportunity for the agency to upgrade its collection and dissemination of data as well as its involvement of the public in its decision-making processes. Part V offers a short conclusion.

I. Background

A. *The FCC In Historical Perspective*

The FCC has long used suboptimal procedures and processes. These failings are not, however, due merely to shortcomings in leadership. Notably, the agency's early leaders often were influenced by the need to make the inherently political judgments of assigning control over radio frequencies through command-and-control regulation. In particular, the agency took as its mandate the need to evaluate which particular firms or individuals were best suited to hold licenses to use the radio spectrum. In some cases, this power was famously used to benefit those with political connections—including then-Congressman Lyndon Johnson's wife¹¹—and, in other cases, it led the agency to make judgments about the relative importance to the U.S. economy of different activities (such as livestock breeding as opposed to dairy inspection).¹² In all cases, the agency was limited in its ability to use judicial-like processes because, as noted economist Alfred Kahn put it, “[t]he dispensation of favors to a selected few is a political act, not a judicial one.”¹³

The agency's culture was shaped by the philosophy that emerged from regulating natural monopolies and an often implicit partnership between the regulated parties and the regulator. As former FCC Chairman Reed Hundt put it, the old tradition embraced monopolies “as the best market structures to deliver universal and high quality communications services, such as telephony or video.”¹⁴ In the assessment of Judge Posner, this model of regulation involved a cozy relationship between the two parties not necessarily because the regulator was captured or

¹⁰ Unfortunately, the complaint of law professor and former FCC Commissioner Nick Johnson lodged over a quarter century ago still holds: “[r]ather than seeking methods for improving the administrative process to avoid unsound, unfair, and arbitrary decisions, scholars have focused almost exclusively on the role of courts in supervising and reviewing agency action.” Nicholas Johnson, *The Second Half of Jurisprudence: The Study of Administrative Decisionmaking*, 23 STAN. L. REV. 173, 173 (1970) (reviewing KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969)) [hereinafter, *Administrative Decisionmaking*].

¹¹ ROBERT A. CARO, *MEANS OF ASCENT* __ (1991).

¹² Petition of Lehigh Cooperative Farmers, Inc., 10 F.C.C.2d 315 (1967) (selecting best applicant for a radio license based on value of relevant occupations).

¹³ THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 286 (1984). For many years, the FCC attempted to justify its use of comparative hearings as to who received a broadcast license as a principled enterprise. Ultimately, however, former FCC Chair Newt Minow captured the prevailing conclusion in stating that “it is largely true that the Commission has failed to develop any coherent policy in the comparative field. Almost every student of the Commission has reached this conclusion[.]” Minow, *supra* note 1, at 148.

¹⁴ Reed Hundt, Chairman, Fed. Commc'ns Comm., Speech at the Center for National Policy (May 6, 1996), available at <http://www.fcc.gov/Speeches/Hundt/spreh624.txt>.

subject to political forces. Rather, as Posner saw it, the regulatory regime allowed (or even encouraged) the interests of the regulator to become intertwined with the conduct of the regulated firm that participated in a program—such as the protection of universal service—that he called “taxation by regulation.”¹⁵

The FCC’s legacy of command-and-control regulation and political favoritism has often steered the agency towards *ad hoc* judgments and away from any principled framework for evaluating alternative courses of action. Almost forty years ago, FCC Commissioner Nicholas Johnson summed up this legacy in bemoaning that “[t]oo often decisions are the product of an *ad hoc* disposition reigning in the absence of any clearly articulated standards for spectrum allocation and utilization priorities.”¹⁶ In reviewing spectrum management by the Commission of the 1960s, Johnson offered criticisms that could be made of today’s Commission, highlighting “the need to view spectrum problems as a whole; the need to anticipate and plan for future spectrum requirements; and the need to obtain better and more complete data on the use of the spectrum.”¹⁷

The FCC of Commissioner Johnson’s day, like today’s Commission, is one where alternative regulatory strategies and a holistic perspective on policymaking are often constrained by the practice of viewing issues in isolation without any strategic direction or focus. In some respects, the Commission has adopted the most limiting aspects of the judicial process—reacting mostly to matters that come before it—as well as the most unfortunate aspect of legislative processes—engaging in political deal-making and rewarding those with influence. In theory, of course, the Commission could combine the best of both traditions—drawing on the judiciary’s legacy of impartiality and data-driven decision-making and the legislative branch’s ability to view issues in a broad and strategic manner. Unfortunately, as Commissioner Johnson noted, the FCC generally fails to utilize any of its own insights or independent research, relying “almost exclusively upon information and analysis supplied by” the parties that appear before it.¹⁸

The FCC’s limited strategic planning and its tendency to engage in *ad hoc* decision-making are perennial points of criticism. In 1949, former President Herbert Hoover—who (as Commerce Secretary) was largely responsible for the establishment of the Federal Radio Commission that evolved into the FCC—led a commission that concluded that the FCC had “failed both to define its primary objectives and to make many policy determinations required for efficient and expeditious administration.”¹⁹ In a similar vein, Professor Landis, who helped President Roosevelt develop the basic architecture of the modern administrative state, authored a report for President Kennedy that excoriated the FCC for being “incapable of policy planning, of disposing within a reasonable period of time the business before it, [and] of fashioning procedures that are effective to deal with its problems.”²⁰ Despite such criticisms, the FCC’s practice of *ad hoc* decision-making has remained largely intact.

¹⁵ Richard A. Posner, *Taxation By Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971); see also Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974).

¹⁶ Nicholas Johnson, *Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation*, 34 LAW & CONTEMP. PROBS. 505, 512 (1969).

¹⁷ *Id.* at 528. For my own suggestions for spectrum policy reform, see Philip J. Weiser, *The Untapped Promise of Wireless Spectrum* (The Hamilton Project of the Brookings Inst., Discussion Paper No. 2008-08, 2008), available at http://www.brookings.edu/~media/Files/rc/papers/2008/07_wireless_weiser/07_wireless_weiser.pdf.

¹⁸ Johnson, *supra* note 16, at 530.

¹⁹ COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, COMMITTEE ON INDEPENDENT REGULATORY COMMISSIONS, TASK FORCE REPORT 95 (1949).

²⁰ JAMES LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 53 (1960)

To underscore the limitations of the FCC, Commissioner Johnson pointed to a landmark proceeding that authorized domestic satellites. This proceeding, while seemingly obscure to many of today's observers, led to a revolutionary form of communications that has transformed an array of communications technologies (from video programming to cell phones to international voice communications). Johnson explained that this proceeding did not emerge from a strategic assessment of technological possibilities and how the Commission could advance their development, but rather from a proposal shaped by AT&T. Consequently, the FCC approached that matter by heading down the road of granting the request without carefully rethinking the appropriate regulatory strategy. Fortunately, as Johnson described it, "[t]he Ford Foundation subsequently filed a proposal that radically changed the frame of reference in which the question was being discussed—including the concept of a 'people's dividend'" from the massive investment that followed the FCC's decision.²¹ That concept, in short, led to proposals for funding for the Public Broadcasting Service that, but for the Ford Foundation's intervention, the Commission would have overlooked.

For another case illustrating the costs of relying on telecommunications companies as the agenda setter at the FCC, consider the decision to authorize cellular telephone service. Like domestic satellite service, the proposal stemmed from a request by AT&T, which sought the sole authority to deploy such a service. Significantly, AT&T's incentive to roll out the service was dulled by its status as a dominant firm evaluating a potentially disruptive technology—i.e., it was skeptical that the technology could succeed, it did not believe there would be a huge market for it, and it worried that wireless services might ultimately pose a threat to its landline operations.²² Consequently, neither the FCC nor AT&T pushed the matter aggressively, meaning that the authorization was "slow rolled," costing American consumers, on one account, \$33 billion in lost productivity gains.²³

In addition to failing to set its own agenda, the FCC often fails to address issues in an intellectually defensible and careful manner. One notable and famous such case arose from the agency's re-evaluation of the financial interest and syndication (finsyn) rules, which restricted the ability of broadcast networks to participate in the production of TV programming. Originally, these rules were seen as providing important protections for independent TV producers, but over time, it increasingly appeared that they served to protect the Hollywood studios (which fought for the preservation of the rules) from competition by the networks that were eager to create their own programming development arms. When it decided to keep the rules in place, the FCC wrote a long opinion that Judge Posner, in overturning it on appeal, famously remarked was "like a Persian cat with its fur shaved, [] alarmingly pale and thin."²⁴ To that zinger, he added that "[t]he impression created [by the agency's opinion] is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring supplicants who have somehow to be conciliated."²⁵

²¹ Johnson, *supra* note 16, at 530.

²² The dulled incentives of AT&T in this case are consistent with the dynamics described in CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* (1997).

²³ Jerry A. Hausman, *Valuing the Effect of Regulation on New Services in Telecommunications*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, MICROECONOMICS 23 (1997).

²⁴ *Schurz Comm. Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992).

²⁵ *Id.*

In evaluating the above proceedings and the Commission's legacy, some former FCC officials have concluded that the agency is prone to "capture" by the interests it regulates. Former Chair Reed Hundt, for example, suggested that the acronym "FCC" stands for "Firmly Captured by Corporations"²⁶ while former FCC Chief Economist Tom Hazlett counters that "FCC" stands for "Forever Captured by Corporations."²⁷ To my mind, the challenge is not so much the classic portrait of agency capture (e.g., the revolving door) or even the more subtle version of the intertwined interests model (i.e., taxation by regulation) advanced by Posner. Rather, because the agency operates with limited imagination, almost no strategic thinking or planning, and with an absence of well-developed sources of data to guide its decisions, it often misses opportunities to chart independent courses of action like the one identified by the Ford Foundation as to satellite policy. To be sure, the agency also has an uncomfortable track record of conducting its proceedings—like the finsyn rulemaking and a number of proceedings discussed below—without engaging in careful data-driven decision-making, thereby inviting reversal on appeal. To highlight this issue, Section B discusses three recent case studies in which the agency has operated in a highly questionable fashion.

B. *The Political Culture of the FCC*

The conduct of administrative regulation at the FCC over the last several years has underscored the institutional failings long cited by critics of the agency. In just the second half of 2007, three high profile and important proceedings—the open access rules imposed as part of the 700 Megahertz (MHz) auction, the proposed regulations on cable based on a finding of adoption of cable services by 70% of consumers, and the media ownership rules—illustrated the problematic nature of the how the FCC often operates. Taken together, the portrait of agency dysfunction raised by these proceedings illustrate the nature of the agency's institutional failings, highlight how it can ultimately undermine the success of policymaking initiatives, and make a compelling case for institutional reform.

In the summer of 2007, the FCC debated and developed rules for imposing an open access obligation on a wireless provider as part of the auction of valuable "beachfront" wireless spectrum in the 700 MHz band.²⁸ In stimulating this discussion, however, the FCC failed to suggest publicly that it had any particular proposal in mind, only stating in its Notice of Proposed Rulemaking (NPRM) the general possibility that it might take some action along these lines.²⁹ Subsequent to the issuance of the NPRM, as Cynthia Brumfield described the process, "Chairman Kevin Martin floated an unofficial proposal (via *USA Today* no less),³⁰ everybody scrambled, a circus ensued and a compromise, *a clearly political compromise*, was ultimately made."³¹ Consequently, the debate over the proposal was hurried and conducted via vague and

²⁶ Hundt, *supra* note 14, at 3.

²⁷ Drew Clark, *Industry Experts Disagree on Best Path to Improve FCC*, TECHNOLOGYDAILY, (Mar. 24, 2005), <http://www.nationaljournal.com/pubs/techdaily/pmeditation/2005/tp050324.htm>.

²⁸ Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Report & Order & Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 8064 (2007).

²⁹ *Id.* at 51-52.

³⁰ Leslie Cauley, *New Rules Could Rock Wireless World*, USA TODAY, July 10, 2007, http://www.usatoday.com/money/industries/telecom/2007-07-09-wireless-telecom_n.htm.

³¹ Cynthia Brumfield, *VZW Sues Over 700 MHz Rules. . . and May Win*, IP DEMOCRACY, Sept. 13, 2007, <http://www.ipdemocracy.com/archives/2007/09/13/#002651> (emphasis in original); *see also* Cynthia Brumfield, *The FCC is the Worst Communicator in Washington*, IP DEMOCRACY, Sept. 5, 2007, <http://www.ipdemocracy.com/archives/2007/09/05/#002640> ("Martin never made his proposal public and everybody was working off of press reports and rumors.").

hard-to-follow *ex parte* filings after the official notice-and-comment period had ended, resulting in a decision that left open a number of issues for later resolution.³²

The rushed nature of the FCC's deliberation and decision-making process gave rise to a subsequent shadow debate over the scope of the rules after they were formally adopted. In the wake of the agency's decision, some parties apparently saw an opportunity for continued lobbying after the matter had purportedly been decided. Using its Policy Blog as a means of shedding sunlight on this development, Google Telecom Counsel Rick Whitt highlighted this very unorthodox tactic and noted with dismay that "it seems that a 'final' vote by a federal government agency is merely the beginning of a new phase in the process."³³ Ultimately, the FCC declined to change its rules in response to this effort.³⁴

The second proceeding that merits examination is the effort by to impose a wide-ranging set of prescriptive regulations on cable companies based on highly questionable information. Under the 1992 Cable Act, the FCC is authorized to develop more restrictive regulations of cable television providers if they reach a level of serving 70% of the country and have 70% of subscribers in that territory.³⁵ The first figure was attained many years ago, but the FCC has never suggested that cable providers had reached the second one, generally suggesting that cable penetration reached around 55% of the population (with satellite TV and over-the-air TV serving the rest).³⁶ In compiling its regular report evaluating the multi-channel video programming distribution (MVPD) marketplace, the FCC regularly asked about the reach of cable television providers, but this report was widely viewed as a fact-gathering effort and not as a prelude to adopting regulations.

In the fall of 2007, Chairman Martin proposed that the FCC conclude that the so-called 70/70 threshold had been met. To justify this finding, he suggested that the agency rely on a single source (a provider that later repudiated its own figure) and sought to suppress other relevant information.³⁷ In so doing, the agency did not use an adjudicative process—or even the formal notice and comment process—to generate a factual basis for its actions or to discuss the issue. Moreover, in proposing to embark on a new course, Chairman Martin did not even alert his fellow Commissioners (let alone the public) of the specifics of the proposed rule changes or the questions related to the data that underlie them. In fact, as the House Commerce Committee majority report found, "[a]ll of the other data collected in response to the Notice of Inquiry was initially withheld from the other Commissioners, and the career staff was directed not to discuss it with them."³⁸ To some observers, this tactic merely reflected his operating style of keeping

³² Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report & Order*, 22 FCC Rcd. 15,289 (2007).

³³ Richard Whitt, *Pro-consumer Spectrum Auction Rules at Risk at the FCC?*, GOOGLE PUBLIC POLICY BLOG, Oct. 3, 2007, <http://googlepublicpolicy.blogspot.com/2007/10/pro-consumer-spectrum-auction-rules-at.html>.

³⁴ According to one account, this decision was not for lack of trying by Martin. See Jeffrey Silva, *Martin Working to Revise 700 MHz Open-Access Provisions*, RCRWIRELESS, Sept. 26, 2007, <http://rcrnews.com/apps/pbcs.dll/article?AID=/20070926/FREE/70926006/1005>.

³⁵ 47 U.S.C. §532(g).

³⁶ Press Release, FCC, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report 1* (Nov. 27, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf.

³⁷ See Ted Hearn, *Watching the Martin Watch*, MULTICHANNEL NEWS, Jan. 21, 2008, <http://www.multichannel.com/article/CA6524092.html>.

³⁸ DECEPTION AND DISTRUST, *supra* note __, at 13.

“his plans tightly wrapped, believing there’s a tactical advantage in springing them on other commissioners with little notice.”³⁹

In the case of the proposed regulations for cable providers, the agency ultimately refused to act in a secretive and hurried manner. Notably, in evaluating the relevant information, Commissioner Adelstein (who apparently was the swing vote) reported on the day he voted against the proposed order that:

I did not learn until after 7:00 pm last night that the FCC’s own 2006 survey found that only 54 percent of homes passed subscribe to cable. Similarly, the FCC’s cable price survey came in at 55.2 percent penetration. Based on these newly unearthed facts and the conflicting evidence on the record, I am unable to support a finding that 70 percent of homes passed subscribe to cable at this time. The data is inconclusive. If we were truly searching for the truth, it is inconceivable that our own data would be cast aside without mention.⁴⁰

Moreover, Commissioner Adelstein noted that the process used in that case—a failure to give sufficient notice to the other Commissioners—did not reflect any imperative for immediate action, but was merely a tactical effort to limit the opportunity for discussion and deliberation.⁴¹

A third proceeding that merits notice is the Commission’s 2007 evaluation of the media ownership rules. In that case, Chairman Martin detailed his proposal in a press release and a *New York Times* op-ed (rather than in a Further Notice) only a little over a month before he

³⁹ Jim Puzzanghera, *Criticism of the FCC’s Chairman is Widely Aired*, L.A. TIMES, Dec. 10, 2007, at C1, available at <http://articles.latimes.com/2007/dec/10/business/fi-fcc10>.

⁴⁰ Statement of FCC Comm’r Jonathan S. Adelstein, Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming 1 (Nov. 27, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A4.pdf.

⁴¹ As Commissioner Adelstein put it:

One of the reasons for the embarrassing delay of today’s meeting, and the general disarray in working through these issues, was the effort to push through such an aggressive number of controversial items today without sufficient notice to all Commissioners. Short-circuiting Commission procedures short-changes the American public in the end. This is particularly true given that nothing we are considering today requires immediate action. There are numerous items that would have benefited greatly from more deliberation and care.

Id. at 3. In that same proceeding, Commissioner Robert McDowell also questioned Chairman Martin’s management of the deliberative process, explaining that:

Interestingly, this year, in a disturbing development, the FCC’s most recent Form 325 data was not made available to commissioners for review until 7:09 p.m. last night. It was only made available once it was obvious that a majority of the Commission would not support the initial draft of this Report because it was such a dramatic departure based on mysterious statistical manipulation. But why was this data omitted or suppressed to begin with? Was it because it concluded cable penetration was only at 54 percent, just like last year?

Statement of FCC Comm’r Robert M. McDowell, Dissenting in Part, Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming 2 (Nov. 27, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A6.pdf.

asked his fellow Commissioners to vote on the proposal.⁴² Notably, this release was not only the first time the public heard of the particular proposal, but it was “also the first time the Commissioners were notified of the details.”⁴³ In defense of this tactic, Chairman Martin stated that the FCC was neither required to, nor in the habit of, releasing the text of the proposed rules before voting on them.⁴⁴

In the media ownership proceeding, the Commission announced its decision in a twelve-page press release a week before Christmas 2007.⁴⁵ At that time, Commissioners Copsps and Adelstein both protested the substance and the process used to develop the rules. In particular, Commissioner Copsps recounted that the FCC engaged in the last minute charade of pretending to allow input via a public hearing in Seattle (at which 1,100 citizens came with a week’s notice) and a last minute notice (after the outcry about the *New York Times* op-ed) while at the same time rushing to complete and vote on an Order without taking the public’s concerns seriously. In a telltale sign of the rushed nature of the proceeding, the process of revising the Order continued right up until the Commission was set to vote on it. As Copsps recounted:

Then, last night at 9:44 pm—just a little more than twelve hours before the vote was scheduled to be held and long after the Sunshine period [when comments, even on an “*ex parte*” basis, can no longer be filed] had begun—a significantly revised version of the Order was circulated. Among other changes, the item now granted all sorts of permanent new waivers and provided a significantly-altered new justification for the [the relevant rules]. But the revised draft mysteriously deleted the existing discussion of the “four factors” to be considered by the FCC in examining whether a proposed combination was in the public interest. In its place, the new draft simply contained the cryptic words “[Revised discussion to come].” Although my colleagues and I were not apprised of the revisions, *USA Today* fared better because it apparently got an interview that enabled it to present the Chairman’s latest thinking.⁴⁶

Finally, in a practice that is all too common at the FCC, the agency did not release its final rules until almost three months after the vote,⁴⁷ leaving affected parties to guess what the Order

⁴² Kevin J. Martin, *The Daily Show*, N.Y. TIMES, Nov. 13, 2007, available at http://www.nytimes.com/2007/11/13/opinion/13martin.html?_r=1&oref=slogin.

⁴³ Testimony of Jonathan S. Adelstein, Federal Communications Commission Oversight Hearing 2 (Dec. 13, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278905A1.pdf. Ironically, the regulations being considered were to replace a set of regulations that the Third Circuit invalidated for, among other reasons, that they were adopted without sufficient public notice to allow careful deliberation and examination of their weaknesses. See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 409-13 (3rd Cir. 2004).

⁴⁴ See Testimony of Kevin Martin, Federal Communications Commission Oversight Hearing 4, (Dec. 13, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278904A1.pdf.

⁴⁵ Press Statement of Kevin J. Martin, Chairman of the FCC, Media Ownership (Dec. 18, 2007), available at <http://www.fcc.gov/kjm121807-ownership.pdf>.

⁴⁶ Statement of FCC Comm’r Michael J. Copsps, Concur in Part, Dissent in Part, Promoting Diversification of Ownership in the Broadcasting Services 2 (Dec. 18, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-217A3.pdf [hereinafter *Copsps Statement*].

⁴⁷ Promoting Diversification of Ownership in the Broadcasting Services, *Report & Order & Third Further Notice of Proposed Rule Making*, 23 FCC Rcd. 5922 (2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-217A1.pdf. For the newspaper/broadcast cross-ownership rule, the FCC released the text of the order around six weeks after the initial vote. See 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report & Order & Order*

discussed, allowing a shadow lobbying process to attempt to influence the issue after the decision, and raising questions about the legitimacy of the decision that was ultimately adopted. In this context, moreover, the delay only underscored that the earlier rushed push for a vote did not reflect any bona fide urgency, but rather was a tactical effort by the Chairman to close a proceeding on his preferred terms.⁴⁸

In all three cases described above, the Commission treated the public as irrelevant to its institutional operation. In each case, interested parties (and even some Commissioners) were reduced to reading press reports (based on leaks) to gain insight into the issues before the agency. Commissioner Adelstein decried the agency's approach to regulatory policy in the cable context, stating that "[w]e cannot cook the books to pursue a political agenda without dismantling our very institution. We simply must act like the expert agency Congress intended, and not squander our precious legacy."⁴⁹ Finally, agency staff persons have criticized the politicized manner in which the agency has operated of late, complaining, on one account, that they were "sick of what they experience as a super-politicized work life in which just about anything that they want to do has to get the go-ahead from the top[.]"⁵⁰

on *Reconsideration*, 23 FCC Rcd. 2010, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.doc.

⁴⁸ In particular, Commissioners Copps and Adelstein noted upon the release of the newspaper/broadcast cross ownership rule that:

After being told we have to "hurry up" and vote by December 18, the Commission waited over a month and a half before finally issuing this Order. Apparently, it took the majority that long to finalize issues left unresolved at the time we voted. There is no reason we could not have heeded the wishes of many in Congress to take the time needed to work these kinks out before the Commission voted.

Press Release, FCC, Joint Statement By FCC Commissioners Michael J. Copps and Jonathan S. Adelstein on Release of Media Ownership Order 1 (Feb. 4, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280001A1.doc.

⁴⁹ Cynthia Brumfield, *FCC Late-Night Vote Underscores Disarray at the Agency*, IP DEMOCRACY, Nov. 28, 2007, <http://www.ipdemocracy.com/archives/2007/11/28/#002781>. Commissioner Copps offered similar assessments as to how the media ownership proceeding was conducted, explaining in his dissenting opinion that:

This is not the way to do rational, fact-based, and public interest-minded policy making. It's actually a great illustration of why administrative agencies are required to operate under the constraints of administrative process—and the problems that occur when they ignore that duty. At the end of the day, process matters. Public comment matters. Taking the time to do things right matters.

Copps Statement, *supra* note 46, at 2.

⁵⁰ Matthew Lasar, *FCC Insider: This Place is Hell; Silent Protest Planned*, ARS TECHNICA, Mar. 16, 2008, <http://arstechnica.com/news.ars/post/20080316-fcc-insider-this-place-is-hell-silent-protest-planned.html>.

In that report, an FCC staff person related that:

In the past I may or may not have agreed with the outcome, but at least the proper procedures were followed. Now they tell us "what are the media reform groups going to do: file a class action lawsuit? Just do it." But ethically I have to sleep at night. It's not the decision, it's *how* the decision is reached. The situation has become arbitrary and capricious.

C. *The Possibility of Regulatory Reform*

Shakespeare famously wrote that “what’s past is prologue[.]”⁵¹ At the FCC, that might well be the case. Nonetheless, policymakers need not view it as inevitable that the agency will continue to use broken procedures. As scholars have emphasized, institutional strategies matter and “organizations can be structured to optimize the benefits and costs of expert decision-making.”⁵² Famously, after President Kennedy blundered in the management of the Bay of Pigs episode, which reflected poor planning and a lack of discussion of alternatives, he instituted a far more effective institutional process to manage the Cuban Missile Crisis.⁵³

For an example of how a regulatory agency can change in terms of its operating procedures, consider the case of the Civil Aeronautics Board (CAB). Historically, that agency’s operating procedures failed to spur deliberation and data-driven decision-making. Thus, after being appointed Chair of the agency, “[Alfred] Kahn criticized what he viewed as an intellectually bankrupt means of doing business—deciding issues in secret, without deliberation, and asking lawyers to develop the necessary justification for a pre-determined result.”⁵⁴ Reflecting his commitment to transparency and open debate, he systematically changed how the agency operated, starting with a commitment to write orders in understandable prose. Ultimately, however, Kahn’s changes at the CAB were short-lived because the agency was dismantled in the 1980s pursuant to the Airline Deregulation Act.

At the Federal Trade Commission, strong leadership and a commitment to sound institutional practices overcame the legacy of an “erratic career” that left the agency vulnerable to mission creep and sailing adrift.⁵⁵ In particular, over the last 25 years, the agency has “come back from the brink” and currently operates in an effective manner that has won accolades for its ability to be an effective political entrepreneur and regulator in the Internet age.⁵⁶ Two successful recent FTC Chairs, Robert Pitofsky and Tim Muris, both were successful political entrepreneurs who effectively utilized strategic planning and a positive agenda to lead the agency, focusing on important opportunities, such as confronting the Internet as an important social and economic

Id (emphasis in original).

⁵¹ WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1.

⁵² Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 561 (2002).

⁵³ *Id.*

⁵⁴ Philip J. Weiser, *Alfred Kahn As A Case Study of A Political Entrepreneur: An Essay in Honor of His 90th Birthday*, 7 REV. OF NETWORK ECON. 603 (2008), available at http://www.rnejournal.com/artman2/publish/Vol7_4/Alfred_Kahn_as_a_Case_Study_printer.shtml. As Kahn described the CAB’s process for generating opinions before his arrival:

[A] lawyer on the General Counsel’s staff, amply supplied with blank legal tablets and a generous selection of clichés—some, like “beyond-area benefits,” “route strengthening” or “subsidy need reduction,” tried and true, others the desperate product of a feverish imagination—would construct a work of fiction that would then be published as the Board’s opinion.

THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 286 (1984).

⁵⁵ MCCRAW, *supra* note 54, at 126-27.

⁵⁶ As FTC Chairman Bill Kovacic described, the FTC was loathed by Congress in the early 1980s, with one Congressman concluding that it was “a rogue agency gone insane.” William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 590 (1982) (quoting Representative William Frenzel). By the time Kovacic wrote his article on the topic, he concluded that the agency was already mending its ways and becoming more effective. *Id.* at 671 (noting its effective use of, among other things, “planning, research, and preliminary screening”). For a more recent positive appraisal of the agency, see Steven Hetcher, *The FTC As Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041 (2000).

force as well as spearheading the enactment of the Do Not Call list regulations. In so doing, they ensured, as Tim Muris put it, that the agency was not merely a “passive observer, swept along by external developments and temporary exigencies.”⁵⁷ The agency’s ability to implement such an agenda and re-establish its value to the nation underscored the wisdom of giving it a second chance to right itself in the midst of calls for it to be shut down on account of its flawed institutional processes and lack of clear-eyed and common sense priorities.⁵⁸

For a final example of how an agency can change, consider the case of Ofcom, the UK regulator of the communications industry. Prior to the establishment of Ofcom, observers complained that the operation of one of its predecessor agencies, the Independent Television Commission (ITC), paralleled in some ways how the FCC operates today. As one regulated entity noted:

[I]n terms of getting a fair hearing and in terms of being confident that the regulator has absolutely assessed the merits of the various competing cases, we think Ofcom plays a pretty straight bat, and that was not always the case in the past. At the ITC, there was a tendency for a decision to come out of nowhere and you would not have any forewarning, you would not even know it was an issue for consultation and suddenly it was not just a consultation, it was a decision.⁵⁹

By contrast to its legacy means of operation, Ofcom has established itself, in a relatively short period of time (it was founded in 2003), as an “evidence-led” regulator that is committed to the proposition that gathering evidence and making data-driven decisions is “part and parcel of effective regulation[.]”⁶⁰

II. Toward A New Institutional Strategy

A critical failing of the FCC is that, with limited exceptions, it rarely acts strategically. The agency’s tendency towards making reactive judgments operates both on the macro-level—in terms of what issues the FCC prioritizes—as well as on the micro-level—how the FCC conducts and manages its particular proceedings. With respect to the macro-level, the FCC generally does not set forth and commit to a clear agenda of what issues it will prioritize; indeed, when it does address specific issues, it generally seeks to preserve its discretion (to act in an *ad hoc* manner) by avoiding standards that constrain its policy choices.⁶¹ On the micro-level, the FCC tends to use NPRMs that set forth broad and vague lines of inquiries, giving parties very little guidance on what issues to address while preserving its discretion to proceed in any number of directions. This practice gives a decided advantage to “inside players,” who

⁵⁷ Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 168 (2005).

⁵⁸ Former FTC Commissioner Phil Ellman, for example, concluded in the early 1970s that the “best thing to do would be to start all over again, abolish the commission and set up a new agency.” NORMAN I. SILBER, WITH ALL DELIBERATE SPEED (2004).

⁵⁹ Statement of Mr. Christy Swords, Director of Regulatory Affairs, ITV, at the House of Lords Select Committee 11 (Apr. 24, 2007), available at www.parliament.uk/documents/upload/correctedEV920070424.pdf.

⁶⁰ *Id.* at 3.

⁶¹ The Landis Report highlights this phenomenon, reporting that “criteria of various different kinds are articulated but they are patently not the grounds motivating decision. No firm decisional policy has evolved from these case-by-case dispositions. Instead the anonymous opinion writers for the Commission pick from a collection of standards those that will support whatever decision the Commission chooses to make.” LANDIS, *supra* note 20, at __.

are sophisticated in reading tea leaves, skilled at keeping up with leaks of information, and able to follow the *ex parte* process, which has long been abused at the FCC.⁶²

Going forward, the FCC has the opportunity to set a strategic agenda and commit to procedures that ensure a high level of transparency. On the strategic level, the FCC needs to establish a pre-set agenda and begin to undertake overarching evaluations of broad policy such as maximizing the use of spectrum, the impact of market structure (on prices, innovation, and, in the media sector, the availability of local and diverse content), and the use of advanced technology by public safety agencies.⁶³ All too often, the FCC approaches these topics in an isolated fashion—say, in the context of a merger review or a proceeding involving a band of spectrum—and is forced to invent its entire approach to an issue on the fly.⁶⁴ In so doing, the agency improvises on a series of dimensions at once—whether to use a rulemaking or an adjudication to set or refine rules, how to emphasize back-end enforcement versus front-end restrictions, and whether to impose disclosure requirements.

The upshot of the FCC’s method of decision-making is that it often makes important judgments with limited data, an artificially constrained set of alternatives, and, in many cases, a penchant for delay.⁶⁵ As is evidenced in a number of cases (including the ones discussed Part I), this approach produces suboptimal results and leaves both Commission staff and affected parties without a clear sense of the agency’s goals or direction.⁶⁶ But the impact of the FCC’s process is more subtle and insidious than that. Notably, because the agency’s flawed processes undermine the ability of investors and entrepreneurs to predict how and when the agency will act, the FCC’s institutional processes discourage new firms from developing technologies that will depend on FCC decisions (say, as to spectrum regulation). Thus, whereas the poor results that flow from the FCC’s flawed processes are sometimes apparent and may be corrected at some point down the road (say, on judicial review), the lack of investment and innovation that ensues from an absence of predictable, expeditious, and reasoned decision-making invariably remains unaddressed and constitutes a loss to the economy and society as a whole.

A. Strategic Agenda Setting

⁶² Indeed, in the Landis Report’s assessment of administrative agencies, it concluded that the FCC “more than any other agency, has been susceptible to *ex parte* presentations.” LANDIS, *supra* note 20, at ___.

⁶³ Former Chairman Hundt and Greg Rosston suggested a similar approach, albeit one that would also involve the Department of Justice. Hundt & Rosston, *supra* note 7, at 34.

⁶⁴ Former FCC Chair Newt Minow claims that this failure is endemic to the multi-member commission structure, which drives the practice of “postpon[ing] the policy decision to resolution on a case-by-case basis which all too often means inconsistent decisions with the public and the regulated industry not knowing the ground rules.” Minow, *supra* note 1, at 147. This claim is questionable, however, insofar as other regulatory agencies, such as the SEC and the FTC, do not face this systemic problem despite the need to operate as a collegial body.

⁶⁵ As noted above, the FCC traditionally relies on the commercial parties for submissions of the relevant data, leaving it hostage to their imagination (or lack thereof) and self-interested objectives. See n. ___ and accompanying text. The Landis Report emphasized this failing, noting that “[l]eadership in the effort to solve problems seems too frequently to be left to commercial interests rather than taken by the Commission itself.” Similarly, it concluded that “On major policy matters, the Commission seems incapable of reaching conclusions.” LANDIS, *supra* note 20, at ___.

⁶⁶ Former FCC Commissioner Johnson bemoaned this state of affairs by highlighting that, if the Commission pre-committed to clear goals, methodologies, and constrained its discretion through a commitment to transparent institutional processes, “[t]he FCC staff and the parties that appear before the Commission would have more specific knowledge of what is required of them in the regulatory scheme, and the regulated industries would operate more efficiently by knowing more about what the Commission’s regulatory policies were designed to accomplish.” Johnson, *Administrative Decisionmaking*, *supra*, at 179.

To appreciate the overall lack of strategic agenda setting at the FCC, consider the model of regulation used by the European Commission (EC). The EC uses a tripartite process to gather information and engage the public when it formulates its regulatory strategy. First, it encourages its staff members to develop their views and perspectives in working papers, which they release to the public. Second, the agency commissions independent research to inform the agency's own thinking. Finally, it engages the public, opening up what it calls a "consultation," to seek diverse views and perspectives on the relevant issues. Based on this process, the EC is in a position to develop its overarching regulatory strategy for a broad policy area, such as the transition to the next generation of Internet technology and the role for public policy therein.⁶⁷ In that context, for example, the EC has set out its specific goals and outlined a timetable for consideration of a number of the relevant issues.⁶⁸

The EU is hardly alone in using a model of regulatory policymaking that involves considerable up-front analysis and discussion before setting an overarching course. Ofcom, the regulator established in the UK in 2003, has internalized a commitment to strategic policymaking. To that end, it embarks on a series of broad reviews, uses regular consultancies, and issues "Annual Plans" to explain its views on the general regulatory environment and what issues will be addressed going forward.⁶⁹ Moreover, in a case closer to home, consider how the Federal Trade Commission (FTC) is engaging in a systematic effort to increase its knowledge base on emerging issues such as behavioral advertising.⁷⁰ In that context, the agency first identified the issue as part of its set of hearings on "Protecting Consumers in the Next Tech-Ade," where it invited a large number of stakeholders to offer their perspectives. Resulting from that investigation, the FTC hosted a Town Hall on "Behavioral Advertising: Tracking, Targeting, and Technology." Finally, after an effort by FTC staff to identify a set of principles and issues for resolution, the agency released a document entitled "Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles," inviting further comments from stakeholders.⁷¹ By contrast, the FCC generally collapses all three of these steps into a single process that all too often begins with a broad and vague notice and ends with a blizzard of *ex parte* filings and rules adopted in haste, without sufficient deliberation, public input, or transparency.

⁶⁷ For the EC's press release, see Press Release, Europa, Commission Consults on How to Put Europe Into the Lead of the Transition to Web 3.0 (Sept. 29, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1422&format=HTML&aged=0&language=EN&guiLanguage=nl>. For the background working paper, see COMMISSION OF THE EUROPEAN COMMUNITIES, *Accompanying Document to the COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS* (2008) (Working document, available at http://ec.europa.eu/information_society/policy/rfid/documents/earlychallengesIOT.pdf).

⁶⁸ COMMISSION OF THE EUROPEAN COMMUNITIES, *COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS* 10-11 (Sept. 29, 2008), available at http://ec.europa.eu/information_society/eeurope/i2010/docs/future_internet/act_future_networks_internet_en.pdf.

⁶⁹ See, e.g., OFCOM, *A CASE STUDY ON PUBLIC SECTOR MERGERS AND REGULATORY STRUCTURES* (2006), http://www.ofcom.org.uk/about/accoun/case_study/case_study.pdf.

⁷⁰ As former Chairman Muris explains, this approach follows similar efforts by Pitofsky and himself to engage in relevant policy research and development. See Muris, *supra* note __, at 176-179.

⁷¹ FTC, *ONLINE BEHAVIORAL ADVERTISING: MOVING THE DISCUSSION FORWARD TO POSSIBLE SELF-REGULATORY PRINCIPLES* (2007).

It merits note that the model of strategic agenda setting urged here is not completely foreign to the FCC. Such an approach, however, has yet to take hold as part of the agency's culture. Consider, for example, the extremely thoughtful framework developed by Chairman Kennard in his vision of "A New Federal Communications Commission for the 21st Century."⁷² In his vision document, Chairman Kennard highlighted the importance of identifying high level strategic priorities and specific measures that the agency proceeds to implement them. Notably, he focused on the value of moving away from classic technology-based distinctions, urging the Commission to focus instead on [1] universal service, consumer protection, and information; [2] enforcement and promotion of pro-competitive goals domestically and internationally; and [3] spectrum management.⁷³ In so doing, he presciently identified that the traditional divide between local and long distance communications would disappear and broadband communications would eclipse narrowband. Unfortunately, while Kennard's vision document identified very important, forward looking questions—such as "whether and how the government should be involved, if at all, in applying [the historic commitment to open architecture and interconnection] in [an environment] where competition will largely replace regulation[.]"⁷⁴ it failed to provide any framework to generate answers for them or timeline for the relevant questions to be addressed.

When Chairman Powell replaced Chairman Kennard, he declined to embrace and follow through on the vision set forth in the "A New Federal Communications Commission for the 21st Century." In particular, he did not seek to fundamentally restructure the operations of the agency along functional lines,⁷⁵ as Kennard had begun to do by consolidating the agency's enforcement and public information functions and had envisioned in his framework.⁷⁶ Although Powell did not take any transformational steps to align the agency's operations on functional lines, he did take the important step of recognizing the impact of technological convergence by merging the separate Mass Media and Cable Bureaus. Moreover, he appreciated, in principle at least, the importance of setting broad areas of focus and identified six of them—(1) broadband; (2) competition; (3) spectrum; (4) media; (5) public safety and homeland security; and (6) the modernization of the FCC. He did not, however, offer any "meta" strategy for how to conceive of and pursue them.

In the important area of spectrum reform, Chairman Powell developed a strategic and broad agenda through a process not unlike that used by the EC. In particular, he commissioned the creation of an interdisciplinary task force that drew upon a number of talented public servants to think through and broadly reconceive of the goals of spectrum policy. The Spectrum Policy Task Force report that emerged from that process gave rise to a number of important issues to evaluate and marked a rare instance where the FCC sought to set a proactive agenda.⁷⁷ Moreover, the Task Force's work and its effort to identify relevant proceedings in a comprehensive and coherent manner markedly distinguished the treatment of that area from other priorities of the agency.⁷⁸ To underscore the point, consider that the only other one of the

⁷² WILLIAM E. KENNARD, A NEW FEDERAL COMMUNICATIONS COMMISSION FOR THE 21ST CENTURY (1999), available at <http://www.fcc.gov/Reports/fcc21.html>.

⁷³ *Id.* at 1.

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 15.

⁷⁶ *Id.* at 10-12.

⁷⁷ FCC, SPECTRUM POLICY TASKFORCE REPORT (2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf.

⁷⁸ Compare, for example, the information related to the relevant goals of the agency with respect to spectrum and other issues. Compare FCC, Strategic Goals for Proceedings and Initiatives, <http://wireless.fcc.gov/spectrum/proceeding.htm> (last visited Dec. 17, 2008) with FCC, Strategic Goals for

six priorities noted above where the agency displayed a hint of broad strategic thinking was public safety and homeland security, where it adopted (in 2003) a two-page action plan to govern its efforts in the area.⁷⁹

Under Chairman Martin, the broad goals identified by Chairman Powell were kept in place, but the broad project of spectrum reform as identified by the Task Force report was essentially abandoned without any effort to set alternative strategic priorities.⁸⁰ In so doing, the agency left spectrum policy issues to once again be addressed on an *ad hoc* basis—i.e., without the benefit of any overarching commitment to resolve particular issues, a more developed empirical and theoretical framework for regulatory policy, or any commitment to communicating to the public the agency’s perspective on those issues. Reflecting the frustration that telecommunications issues are not guided by any overarching agenda and thus appear on (and disappear from) the agency’s agenda without apparent reason or warning, some commentators have complained that the FCC is “the worst communicator in Washington.”⁸¹

B. A Commitment to Transparency

The FCC’s lack of transparency operates on a number of levels. First, when the agency announces a rulemaking, it rarely suggests specific rules and sometimes does not even ask specific questions for parties to address. Second, the FCC’s notice-and-comment processes are often a meaningless precursor to the “real” discussion that occurs during the so-called *ex parte* process, where parties file short statements that, at least often in practice, do not set out the full extent of oral discussions. This unofficial opportunity for comment, which is not regulated by any legal framework and generally is available only to those well connected to the agency, was judged by FCC Chairman Powell in 2005 as “out of control.”⁸² Finally, when the FCC announces its adoption of an order, it often does so without releasing the actual text, raising questions as to what the agency actually voted on and what happens between the so-called vote and the final issuance of the order—which can take place many months later. I will discuss how and why the FCC needs to reform each of these shortcomings.

In terms of the use of rulemaking proceedings, the FCC has gotten into the habit of commencing wide-open rulemakings that do not propose specific rules and leave parties with the

Competition, <http://www.fcc.gov/competition> (last visited Dec. 17, 2008), and FCC, Strategic Goals for Broadband, <http://www.fcc.gov/broadband/> (last visited Dec. 17, 2008), and FCC, Strategic Goals for Media, <http://www.fcc.gov/mediagoals/> (last visited Dec. 17, 2008).

⁷⁹FCC, HOMELAND SECURITY ACTION PLAN (2003), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-236428A2.pdf

⁸⁰ See Establishment of an Interference Temperature Metric to Quantify and Manage Interference and to Expand Available Unlicensed Operation in Certain Fixed, Mobile and Satellite Frequency Bands, *Order*, 22 FCC Rcd. 8938 (2007) [hereinafter *Interference Temperature Metric*], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-78A1.pdf. CITE to Copps statement.

⁸¹ Cynthia Brumfield, *The FCC is the Worst Communicator in Washington*, IP DEMOCRACY, Sept. 5, 2007, http://www.ipdemocracy.com/archives/002640the_fcc_is_the_worst_communicator_in_washington.php; see also John Dunbar, *FCC Shrouds Rulemaking in Secrecy*, THE NEWS & OBSERVER, Sept. 5, 2007, <http://www.newsobserver.com/print/wednesday/front/story/692625.html> (“It’s odd for an agency that has the word ‘communications’ as its middle name, but the Federal Communications Commission routinely leaves the public in the dark about how it makes critical policy decisions.”); Ted Hearn, *Federal Incommunicado Commission*, MULTICHANNEL NEWS, Aug. 8, 2007, <http://www.multichannel.com/blog/1830000183/post/450012845.html>.

⁸² Michael K. Powell, Remarks at the Digital Broadband Migration Conference: Rewriting the Telecom Act (February 14, 2005), <http://caetevida.colorado.edu/TEGRITY/SiliconFlatirons/SilFlatsFeb05L06.wmv>.

challenge of guessing what issues are really important—or reserving their energies and resources until the *ex parte* process when that might become clear. Technically speaking, this practice does not violate the Administrative Procedure Act, as that law only specifies that NPRMs must include “a description of the subjects or issues involved.”⁸³ Practically speaking, however, this practice undermines the opportunity for meaningful participation and effective deliberation.

To appreciate the real world impact of the FCC’s practice, consider the case of a recent initiative to impose requirements on local radio stations to compile playlists and community outreach efforts.⁸⁴ The basic idea behind the proceeding—to develop more information related to how radio stations operate—was a noble one (see Part III, below), but the way it was conducted deprived the public and affected parties of key information that could have informed their participation and feedback. In that case, radio lobbyists were left scrambling to find out relevant details about the specific proposal, such as who would have to submit such reports and how often.⁸⁵ Unfortunately, the situation was hardly unique, with “[c]ommunications lawyers and lobbyists privately complain[ing] they have difficulty figuring out the status of their issues at the FCC.”⁸⁶ This state of affairs raises the obvious question that, in an environment where even some well-connected lobbyists cannot discern such information, how can ordinary consumers hope to offer meaningful input?

To remedy the FCC’s use of vague and generalized NPRMs, the agency should commit to publishing model rules or at least specific suggestions on any topic it envisions addressing to set the stage for public comment. If the agency engages in the strategic planning effort suggested above, disclosing more relevant details at the outset of proceedings should flow naturally. Notably, releasing the proposed rules up front is the common practice for many other agencies;⁸⁷ for the FCC, however, it constitutes the exception. This places the FCC far outside the norm of most agencies, which release notices that “routinely contain the full text of the rule as well as lengthy preambles, including the information, data, and analyses upon which the agency relied.”⁸⁸

If the FCC persists in opening proceedings with only a general description of the relevant issues, it has two options for providing sufficient notice and enabling effective deliberation. First, it could begin with a Notice of Inquiry, which is designed to elevate the agency’s understanding of an issue and not to generate binding rules. Alternatively, if it does use an NPRM with limited disclosure of the issues that ultimately emerge as important, it should issue a Further Notice of Proposed Rulemaking, as the agency recently did in the so-

⁸³ 5 U.S.C. § 553(b)(3). The D.C. Circuit has specified that the relevant concern is that “[i]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.” *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

⁸⁴ Broadcast Localism, *Report on Broadcast Localism & Notice of Proposed Rulemaking*, 23 FCC Rcd. 1324 (2008).

⁸⁵ Amy Schatz, *Industry Seethes as FCC’s Martin Sets New Curbs*, THE WALL STREET JOURNAL, Dec. 18, 2007, at A1.

⁸⁶ Puzanghera, *supra* note __.

⁸⁷ At NTIA, for example, Notices of Proposed Rulemakings often are both shorter in terms of the relevant background and focus commenters specifically on suggested rules. See, e.g., E-911 Grant Program, 73 Fed. Reg. 57,567 (Oct. 3, 2008) (to be codified at 47 C.F.R. pt. 400).

⁸⁸ Jennifer Nou, Note, *Regulating the Rulemakers: A Proposal for Deliberative Cost-Benefit Analysis*, 26 YALE L. & POL’Y REV. 601, 610 (2008).

called D Block proceeding (which was designed to facilitate the emergence of a private-public partnership for public safety communications).⁸⁹

As for the *ex parte* process, the agency's commitment to greater transparency as to what issues are up for discussion at the commencement of a rulemaking will limit the need and opportunity for a heavy reliance on *ex parte* communications. In any event, the agency needs to take seriously the commitment to a reasonable level of disclosure when *ex parte* meetings take place. Indeed, in some cases, the general disclosures in the filings that accompany such meetings verge on the comedic. Take, for example, a filing by Alltel that stated merely that company officials met with a few FCC staff persons "to share our thoughts" on a particular proceeding.⁹⁰ This sort of filing has repercussions for the parties themselves insofar as their desire to keep their presentations secret is at odds with the legal requirement to make "a record" of their objection in order to pursue them on appeal. Thus, a system of *ex parte* filings devoid of content not only is detrimental to informed deliberation of the relevant issues, but also undermines the opportunity for meaningful judicial review.⁹¹ To be sure, the penalty placed on parties deprived of judicial review provides some incentive not to engage in the prevailing practice, but the culture of secrecy retains a powerful hold on those engaged in the *ex parte* process. Consequently, the appropriate remedy is a fundamental reform of how the agency operates, including not merely ending the use of vague NPRMs, but also requiring agency officials (as opposed to lobbyists) to be responsible for filing the document that captures the relevant discussions (as many other agencies require).⁹²

The abuse of the *ex parte* process is exacerbated by two features of FCC proceedings that are under the Commission's control—(1) the length of the proceedings; and (2) the lack of a well-developed and evidence-based record. First, if the FCC could manage its proceedings with an eye to how issues are developed and commit, as a general strategy, to open a Further NPRM after a certain interval, it would elevate the importance of "official" filings—as opposed to placing the real weight on *ex parte* filings. One option, suggested by a few commentators, is to institute a "shot clock" that would require agency action within a prescribed period of time.⁹³ Rather than impose a procedure that would artificially rush resolution of difficult issues, however, the agency should institute the norm that it will conduct proceedings in a timely manner and embarrass itself when it does not—prominently listing on its website the pending proceedings, how long they have remained unresolved, and the status of the record.⁹⁴ Second, if

⁸⁹ Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, WT Dkt. No. 06-150, 2008 WL 4382752 (Sept. 25, 2008).

⁹⁰ Letter From Laura Carter, Vice President for Federal Government Affairs, Alltel Corporation, to Marlene Dortch, Secretary, FCC (Apr. 30, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520006854

⁹¹ In a costly example of this phenomenon at work, Sprint was prevented from challenging certain FCC rules that might require it to vacate valuable spectrum because the company had failed to make its arguments in *ex parte* filings with sufficient specificity to be preserved for appellate review. See *Sprint Nextel Corp. v. FCC*, 524 F.3d 253, 256-58 (D.C. Cir. 2008).

⁹² Another obvious option—for the agency to police abuses in the *ex parte* process itself—is one that the FCC has shown itself unwilling to or incapable of pursuing. See Mike Marcus, Marcus Spectrum Solutions Files Petition on Asking FCC to Pay More Attention to *ex parte* Violations, Spectrum Talk Blog (September 11, 2008), <http://spectrumtalk.blogspot.com/2008/09/marcus-spectrum-solutions-files.html>.

⁹³ For a skeptical assessment of such suggestions, see Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171 (1987).

⁹⁴ To appreciate the need and cause for such embarrassment, consider that it is not unheard of for the FCC to leave proceedings languishing for longer than a decade. See Ted Hearn, *The Winds of Change*, MULTICHANNEL NEWS, Jan. 28, 2008, <http://www.multichannel.com/article/CA6525874.html> (noting

the FCC would, as discussed below, use Administrative Law Judges (ALJs) to conduct proceedings and develop an evidentiary record through open testimony under oath, it could radically change the agency's culture. In particular, once an ALJ published proposed findings of fact for evaluation by the Commission, the discussion would center on a relevant set of issues grounded in empirical data, ending the guesswork that drives much of the *ex parte* process for those who are not well-connected lobbyists.⁹⁵ Third, as discussed below, the FCC could commission and publish independent research to inform its deliberations and highlight the relevant issues for discussion.

Finally, as to the FCC's procedure for adopting rules, the agency needs to commit to issuing its written opinions on the day the decision is announced. At present, many high profile matters are decided when the actual written opinion has yet to be finalized. As for what the agency does during this time, one commentator suggested that the opinions do not reflect "well-reasoned statements of principle," but rather are a "patchwork of pieces" that must be stitched together after the decision is announced, often requiring substantive redrafting.⁹⁶

III. Towards Principled and Collegial Decisionmaking

One critical challenge facing the FCC is how to evaluate more carefully how and when to use notice-and-comment rulemaking, adjudication, and merger review proceedings as strategies for making policy decisions. In all three contexts, the agency often takes procedural shortcuts that avoid engaging in true data development and evaluation. Consequently, the agency's "quasi" status—as a quasi-executive, quasi-legislative, and quasi-judicial body—becomes an impediment, rather than an asset, in addressing economic and social problems. As former FCC Chair Newton Minow put it, the FCC's ineffective use of this authority leaves it in "a never-never land" that produces only "quasi-solutions."⁹⁷ To highlight the failings in each context and the need for a more well-thought out strategy of how they should be used, I discuss one example of each and present a number of different possible reforms.

A. Notice and Comment Rulemaking

The theory of notice-and-comment rulemaking is that an agency can use this process to develop its policy judgments. The weakness of this format is that it does not provide the agency with an effective avenue for developing an empirical basis for and understanding of the issues involved in a regulatory policy domain. As Judge Posner explained in observing the agency's handling of the finsyn rules, "[t]he nature of the record compiled in a notice-and-comment rulemaking proceeding—voluminous, largely self-serving commentary uncabined by any principles of reliability, let alone by the rules of evidence—further enlarges the Commission's discretion and further diminishes the capacity of the reviewing court to question the Commission's judgment."⁹⁸ Indeed, the appeal of using a procedure that can lead to "a cooking

pendency of petition to deny must carry rights to TV stations that primarily air home shopping programming).

⁹⁵ In a stinging report that criticized the FCC's management of its *ex parte* process, the GAO determined that the FCC effectively enabled well-connected lobbyists to gain crucial information and insights about its processes that were not available to the public. GAO, FCC SHOULD TAKE STEPS TO ENSURE EQUAL ACCESS TO RULEMAKING INFORMATION, (2007), available at <http://www.gao.gov/new.items/d071046.pdf>. In a partial response, the FCC committed to post on its website all items that are circulating for a decision.

⁹⁶ Harry M. Shooshan III, *A Modest Proposal for Restructuring the Federal Communications Commission*, 50 FED. COMM. L.J. 637, 648 (1998).

⁹⁷ Minow, *supra* note 1, at 146.

⁹⁸ *Schurz Commc'ns v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992).

the books,” as Commissioner Adelstein noted as to an earlier rulemaking,⁹⁹ leads the FCC to rely almost exclusively on the paper record of the notice-and-comment rulemaking process and the use of the opaque *ex parte* process as a means of focusing in on its conclusions.

To appreciate the value of a process focused on data-driven analysis, consider the FCC’s recent development of a location mandate for E-911 calls made from wireless phones. At a high level of generality, there was a consensus that facilitating better access to this information for public safety answering points (PSAPs) was an important public policy goal. In conducting the proceeding, however, the FCC used some of the same tactics noted above, seeking to impose greater specificity as to the location accuracy that wireless providers must share with PSAPs after a rushed process and on the basis of an *ex parte* proposal that was subject to no public comment and no agency deliberation.¹⁰⁰

In dissenting from the E911 location Order, Commissioner Adelstein noted that “while I support providing first responders with the best data possible, today’s item is fraught with highly dubious legal and policy maneuvering that bypasses a still developing record on what should be the reasonable and appropriate implementation details.”¹⁰¹ In particular, Commissioner Adelstein added that:

Given the huge commitment of resources and effort needed to make the vast progress we have yet to make, a collaborative, cooperative approach is the most effective way to achieve the goals all of us share. Adopting in whole cloth an eleventh hour proposal at the stroke of Sunshine’s end is not the way to promote an atmosphere for progress. Instead of working with all stakeholders, the Commission today simply adopts on a Tuesday a proposal filed on Friday. Offering no opportunity for deliberation or participation by so many stakeholders does not befit an expert agency.¹⁰²

In highlighting the FCC’s questionable conduct, Adelstein noted that the agency should not have rushed to a decision on a paper record, but rather should have taken advantage of workshops and collaborative forums to reach a solution that all parties, at least in principle, were committed to reaching.¹⁰³ Ultimately, the Public Safety and Homeland Security Bureau acknowledged that the Order was overly aggressive and imposed a stay,¹⁰⁴ prompting Commissioner Adelstein to highlight that the earlier decision to plow “forward with [mandating] compliance benchmarks without a full record, rather than conducting this proceeding in a more thoughtful and deliberate manner, [did] not truly advance E911.”¹⁰⁵

Rulemaking proceedings conducted on a paper record can serve a useful function. They are not, however, the right tool for all regulatory policy challenges. Moreover, they need to be used in a more strategic context—relying on developed knowledge and allowing for informed

⁹⁹ Commissioner McDowell apparently seconded that judgment, in a private email to his staff. See DECEPTION AND DISTRUST, *supra* note __, at 14 (quoting McDowell as stating “[t]he books have been cooked to trigger the 70/70 rule.”).

¹⁰⁰ Wireless E911 Location Accuracy Requirements, *Report & Order*, 22 FCC Rcd. 20,105 (2007).

¹⁰¹ *Id.* at 20,136 (statement of Commissioner Jonathan S. Adelstein approving in part, dissenting in part).

¹⁰² *Id.* at 20,137.

¹⁰³ See Wireless E911 Location Accuracy Requirements, *Notice of Proposed Rulemaking*, 22 FCC Rcd. 10,609, 10,636-37 (2007) (concurring statement of Commissioner Jonathan S. Adelstein)

¹⁰⁴ Wireless E911 Location Accuracy Requirements, *Order*, 23 FCC Rcd. 4011.

¹⁰⁵ Press Release, FCC, Commissioner Jonathan S. Adelstein Responds to Public Safety Bureau Stay Order (Mar. 12, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280787A1.pdf.

deliberation—to be successful public policymaking tools. Notably, rulemakings need not be viewed as either/or tools to the use of adjudication, but can actually follow from and be informed by adjudication. Finally, rulemakings must be managed with appropriate oversight—neither rushing issues to a premature judgment nor allowing them to linger without any resolution.¹⁰⁶

B. Adjudications, Enforcement, and the Use of ALJs

The FCC so seldom uses adjudicative processes that some observers overlook the fact that the agency is authorized to use them at all. Indeed, when the agency conducts an adjudication, the process looks nothing like traditional adjudicatory processes. After all, the FCC often provides no opportunity for discovery, the submission of evidence under oath, the open selection of witnesses, or cross-examination. Consider, for example, the recent *Comcast* case involving that company’s network management processes.¹⁰⁷ In that case, the FCC styled the proceeding as an adjudication even though it did not use any judicial-like process—i.e., the actual proceeding mirrored the agency’s rulemaking processes noted above. Indeed, that proceeding once again evoked the all too familiar complaints by dissenting Commissioners that they were forced to vote on an Order without the benefit of sufficient time to evaluate its substance.¹⁰⁸

The FCC’s management of the *Comcast* case in a fashion more akin to a rulemaking should not surprise observers of the agency. After all, the FCC only employs two ALJs and they rarely are given assignments to handle adjudicative proceedings. As for the Enforcement Bureau, its processes are often managed with a level of political oversight and a lack of commitment to neutral determination of complaints. Consequently, it is not empowered to act effectively on complaints and has failed, according to a GAO report, to resolve many of them or explain why no action was taken.¹⁰⁹

Going forward, the FCC has an important opportunity to invigorate its enforcement program and use it in a more strategic matter. As for enforcement, the FCC needs to develop a better capability for enforcing its rules in a credible manner so that it can, in appropriate instances, shift from its legacy focus on restricting what parties can do before-the-fact to evaluating the impact of actual behavior after-the-fact. In the case of spectrum policy, for example, the FCC’s legacy orientation means that spectrum licensees are restricted in how they can use their spectrum so that they avoid even the theoretically possible creation of interference—as opposed to making a showing that they created interference in practice.¹¹⁰ To be sure, the FCC

¹⁰⁶ For a comprehensive assessment of the rulemaking process at administrative agencies (with a focus on the FCC), see GAO, FURTHER REFORM IS NEEDED TO ADDRESS LONG-STANDING PROBLEMS (2001), <http://www.gao.gov/new.items/d01821.pdf>.

¹⁰⁷ Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion & Order*, 23 FCC Rcd. 13,028 (2008) [hereinafter *Free Press Complaint*].

¹⁰⁸ *Id.* at 13,088 (dissenting statement of Commissioner Robert M. McDowell) (“Commissioner Tate and I received the current version of the order at 7 p.m. last night, with about half of its content added or modified. As a result, even after my office reviewed this new draft into the wee hours of the morning, I can only render a partial analysis.”).

¹⁰⁹ GAO, FCC HAS MADE SOME PROGRESS IN THE MANAGEMENT OF ITS ENFORCEMENT PROGRAM BUT FACES LIMITATIONS, AND ADDITIONAL ACTIONS ARE NEEDED 5 (2008), <http://www.gao.gov/new.items/d08125.pdf>.

¹¹⁰ For a discussion of this issue, see Philip J. Weiser & Dale Hatfield, *Spectrum Policy Reform and the Next Frontier of Property Rights*, 15 GEO. MASON L. REV. 549, 558-68 (2008); Weiser, *supra* note 17, at 26-28.

has experimented with the model of allowing greater front-end flexibility in return for after-the-fact oversight,¹¹¹ but this approach is the exception.

To appreciate the limited development of the FCC's enforcement processes, consider the longstanding complaints that satellite radio providers were violating the terms of their licenses. In particular, as Commissioner Tate put it, Sirius Satellite Radio "failed to comply—knowingly and repeatedly—with the specifications for its FM modulators and the terms of its Special Temporary Authorizations ("STAs") for more than five years."¹¹² In the face of this problem, one might suspect the FCC had conducted a vigorous enforcement proceeding. That belief, however, would be mistaken. In fact, the FCC only took action and entered into a consent decree with the two companies once they were on the brink of receiving approval to merge with one another. Consequently, as a condition of receiving approval to merge, XM agreed to a "voluntary contribution" of \$17,394,375 and Sirius agreed to one of \$2,200,000.¹¹³

The FCC's failure to treat seriously the longstanding complaints about Sirius and XM's behavior is emblematic of the agency's lack of commitment to effective enforcement. In failing to enforce its rules effectively and reliably, the FCC both undermines a commitment to rule-of-law values and sometimes ends up making accommodations to parties who violated rules that were not previously enforced.¹¹⁴ Ideally, the FCC would, in such cases, authorize the Enforcement Bureau to bring cases before ALJs to develop the necessary factual record to either make the entry of consent decrees a meaningful law enforcement act (as opposed to a political negotiation¹¹⁵) or lead to an adjudicated decision. In practice, however, the FCC almost never uses its ALJs and, according to its website, its ALJs have decided only three matters since 2005.¹¹⁶ In fact, the ALJs are reportedly kept busy by being loaned out to the Social Security Administration.

The promise of using ALJs is readily apparent when one evaluates how state agencies manage telecommunications policymaking. In many cases, state public utility commissions are able to use ALJs to hear evidence and create a well developed factual basis for the agency's deliberations.¹¹⁷ Indeed, in some states, the "ALJs are more independent than state appellate or trial court judges."¹¹⁸ In using ALJs, state commissions (and federal ones like the Federal Energy

¹¹¹ See Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems, *Report & Order*, 19 FCC Rcd. 21,265 (2004) [hereinafter *BPL Order*].

¹¹² Sirius Satellite Radio Inc., *Order*, 23 FCC Rcd. 12,301, 12,324 (Statement of Commissioner Deborah Taylor Tate)

¹¹³ XM Radio, Inc., *Order*, 23 FCC Rcd. 12,325, 12,347 (2008) (consent decree with XM); 23 FCC Rcd. at 12,324 (consent decree with Sirius).

¹¹⁴ See, e.g., Unlicensed Operation in the TV Broadcast Bands, *Second Report & Order & Memorandum Opinion & Order*, ET Dkt. No. 04-186, 2008 WL 4908842 (Nov. 14, 2008); see also Posting of Harold Feld to Wetmachine, *We File Wireless Microphone Complaint: Shure Says Breaking Law Should Be OK If You Sound Good*, <http://www.wetmachine.com/totsf/item/1256> (July 16, 2008, 18:53 EST)

¹¹⁵ The practice of treating enforcement actions as a political negotiation is discussed and criticized in the House Commerce Committee majority report. See DECEPTION AND DISTRUST, supra note __, at 18-19, 23-24.

¹¹⁶ Office of Administrative Law Judges, <http://www.fcc.gov/oalj> (last visited Dec. 19, 2008).

¹¹⁷ Robert C. Atkinson, *Telecom Regulation For the 21st Century: Avoiding Gridlock, Adapting to Change*, 4 J. TELECOMM. & HIGH TECH L. 379, 396 (2006) (noting that state PUCs, unlike the FCC, use ALJs regularly and arguing that the FCC should begin using them effectively).

¹¹⁸ Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 571 (2001).

Regulatory Commission) separate the trial staff so that they do not interact with the staff persons who advise the commission in its role as adjudicator.

In conceiving the appropriate role for ALJs, it is important to appreciate that they need not be used to decide matters of regulatory policy *per se*. Rather, they can merely be asked to determine the relevant facts, which is their comparative advantage. Take, for example, the *Comcast* decision, where the FCC attempted, using a paper record, to evaluate what types of network management techniques Comcast used. In so doing, the FCC relied on the self-serving and unexamined statements presented in that process and reached a judgment vulnerable to the criticism offered by Commissioner McDowell: “[t]he truth is, the FCC does not know what Comcast did or did not do.”¹¹⁹ The FCC could instead have referred the matter to an ALJ to render a set of proposed factual findings pursuant to established procedures that would have enabled the agency to better understand the relevant facts and make a more informed policy judgment.

In contemplating a role for ALJs, it is important to recognize that this model can be implemented in more or less effective ways. At the FTC, for example, the use of administration adjudication can undermine that agency’s effective and expeditious resolution of disputes when personnel rules prevent the agency from using ALJs with relevant expertise in antitrust or consumer behavior. To address this issue, the agency has recently proposed new rules to expedite the process, has experimented with using Commissioners to sit as ALJs (although that raises questions about prejudging issues), and has asked Congress to allow it to select ALJs with relevant experience. Nonetheless, even assuming that the FTC improves its administrative litigation process, some have leveled the more fundamental criticism of this model of decision-making that it often leads to the pre-ordained results sought by the FTC.¹²⁰ This cautionary concern, to the extent it counsels against administrative litigation in the FTC context, is far less applicable in the FCC context where “cooking the books” is already an endemic concern as to its rulemaking processes. Consequently, the effective use of ALJs by the FCC promises to improve the quality of its policymaking process because it would provide the agency with a more rigorous factual understanding of the relevant issues than can be obtained by sorting through a paper record to identify the salient facts.

C. Merger Reviews

The third principal type of action taken by the FCC is merger review proceedings. Technically speaking, these proceedings are adjudications, but practically speaking, these proceedings are often negotiations where the FCC seeks to leverage its authority to approve the

¹¹⁹ *Free Press Complaint*, 23 FCC Rcd. at 13,092 (dissenting statement of Commissioner Robert M. McDowell). As McDowell explained,

The evidence in the record is thin and conflicting. All we have to rely on are the apparently unsigned declarations of three individuals representing the complainant’s view, some press reports, and the conflicting declaration of a Comcast employee. The rest of the record consists purely of differing opinions and conjecture.

Id.

¹²⁰ See Douglas A. Melamed, *The Wisdom of Using the “Unfair Method of Competition” Prong of Section*, GLOBAL COMPETITION POLICY 12-24 (November 2008), http://www.wilmerhale.com/files/Publication/704e2922-6df7-4bb7-bd88-014695e523b1/Presentation/PublicationAttachment/f5c9a3c8-3a90-4b16-900b-2a54a5ba420a/Melamed_Nov_08_1.pdf

merger to obtain concessions that often have little or nothing to do with the competitive issues raised by the transaction.¹²¹ In his criticism of this process, former Chairman Powell noted that it “places harms on one side of a scale and then collects and places any hodgepodge of conditions—no matter how ill-suited to remedying the identified infirmities—on the other side of the scale.”¹²² Thus, unlike the Justice Department, the FCC does not make any effort to ensure that there is “a significant nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions.”¹²³ But because the very nature of the proceeding involves “voluntary” concessions, this type of action is outside the scope of judicial review.

In conducting its merger reviews, the FCC often engages in a form of the rushed judgments that it makes at the end of a rulemaking proceeding. Consider, for example, the review of the merger between AOL and Time Warner in 2001.¹²⁴ In that case, the FCC evaluated whether it should impose an interoperability mandate on AOL’s instant messaging service (AIM). In so doing, the agency not only failed to analyze the connection of the remedy to the merger, but it cursorily concluded that it had the authority to regulate in an area outside its traditional mandate. Notably, the FCC concluded that instant messaging and “AOL’s [names and presence database] are subject to our jurisdiction under Title I of the Communications Act.”¹²⁵ As then-Commissioner Powell pointed out in dissent, it was questionable for the FCC to reach such a judgment in haste, as “such a grand conclusion should only be reached after very careful and thoughtful deliberations and full comment by a wide range of interested parties[.]”¹²⁶ As to the merits of the FCC’s action, there were serious questions at the time that its decision was flawed on competition policy grounds.¹²⁷ The passage of two years revealed as much and the FCC decided to remove the condition.¹²⁸

A second flaw in the FCC’s use of its merger authority is that the willingness of applicants to negotiate “voluntary conditions” facilitates the agency’s tendency to make decisions in an *ad hoc* manner. Despite the fact that such conditions only apply to the merging parties, the FCC sometimes uses such proceedings to decide issues that are otherwise pending in industry rulemakings—leading to one set of rules for those who have merged and another set of rules for similarly situated parties who have not. Consider, for example, the issue of whether local telephone companies should be required to provide “naked DSL” (i.e., DSL service without providing a telephone line). Rather than address the issue in an industry-wide rulemaking, the FCC used the pendency of two merger proceedings involving the largest telephone companies

¹²¹ One commentator has referred to this tactic as “administrative arm-twisting.” Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873.

¹²² Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, *Memorandum Opinion & Order* 14 FCC Rcd. 14,712, 15,197 (1999) [hereinafter *Ameritech Order*] (Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part).

¹²³ U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 2 (2004), available at <http://www.usdoj.gov/atr/public/guidelines/205108.pdf>.

¹²⁴ Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, *Memorandum Opinion & Order*, 16 FCC Rcd. 6547 (2001).

¹²⁵ *Id.* at ¶ 148, at 6610.

¹²⁶ *Id.* at 6713 (statement of Comm’r Michael K. Powell, concurring in part and dissenting in part).

¹²⁷ See Philip J. Weiser, *Internet Governance, Standard Setting, and Self-Regulation*, 28 N. KY. L. REV. 822, 842 (2001).

¹²⁸ Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, *Memorandum Opinion & Order*, 18 FCC Rcd. 16,835 (2003).

(AT&T and Verizon) to impose such a requirement on them alone.¹²⁹ Similarly, with respect to network neutrality, the FCC had originally suggested that its Internet policy statement was non-binding;¹³⁰ nonetheless, when SBC and Verizon proposed to merge with AT&T and MCI, respectively, the FCC imposed a condition that the companies agree to abide by follow those principles.¹³¹ In urging that the agency not operate in this fashion, then-Commissioner Abernathy highlighted that “the customary administrative weaponry in the Commission’s arsenal—rulemaking, enforcement, and so on—does not suddenly evaporate once a merger is approved.”¹³²

The final flaw that often inheres in the FCC’s merger review process is the agency’s practice of accepting a variety of “voluntary conditions” that it later declines to enforce. Consider, for example, the FCC’s decision to condition the merger between SBC and Ameritech on, among other things, SBC’s commitment to entering into thirty markets outside of its region.¹³³ The sheer ambition of enforcing such a commitment begs so many questions—what constitutes “real entry,” is a transitory entry sufficient, etc.—that it did not surprise seasoned observers of the agency that there was little or no follow-through on enforcing the commitment. Nonetheless, the agency continues to impose a variety of conditions that are far from self-executing and are outside its normal regulatory mandates, doing so most recently in the merger of XM and Sirius, where the agency imposed a series of conditions ranging from an “a la carte” mandate to a requirement to provide non-commercial channels.¹³⁴ Despite the request of some parties to adopt a specific enforcement mechanism to ensure that such requirements are followed,¹³⁵ the FCC declined to do so, suggesting that, once again, the past may well be prologue in terms of enforcing merger conditions.

It would be unfair to suggest that the FCC’s merger review processes are invariably and necessarily dysfunctional and that they can only be remedied by stripping the agency of such authority altogether. To be sure, former Commissioner Harold Furchtgott-Roth has made this very claim.¹³⁶ This position, however, overlooks that there are successful cases of FCC merger review and the agency’s oversight of mergers can be a productive part of the process.¹³⁷

¹²⁹ See SBC Commc’ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control, *Memorandum Opinion & Order*, 20 FCC Rcd. 18,290, ¶ 211, at 18,392 (2005) [hereinafter *AT&T Order*]; and Verizon Commc’ns Inc. and MCI, Inc., *Memorandum Opinion & Order*, 20 FCC Rcd. 18,433, ¶ 221, at 18,537 (2005) [hereinafter *Verizon Order*].

¹³⁰ See News Release, Chairman Kevin J. Martin Comments on Commission Policy Statement, (August 5, 2005) (“While policy statements do not establish rules nor are they enforceable documents, today’s statement does reflect core beliefs that each member of this Commission holds regarding how broadband internet access should function.”), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A2.pdf.

¹³¹ *AT&T Order*, 20 FCC Rcd. at ¶ 108, at 18,350-51; *Verizon Order*, 20 FCC Rcd. at ¶ 143, at 18,509.

¹³² *Verizon Order*, 20 FCC Rcd. 18,433 (Statement of Commissioner Abernathy), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-184A3.pdf

¹³³ *Ameritech Order*, 14 FCC Rcd at 14,877.

¹³⁴ See Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee, *Memorandum Opinion & Order & Report & Order*, 23 FCC Rcd. 12,348, 12,359 (2008).

¹³⁵ Public Knowledge and Media Access Project filings, MB Docket -07-57, of July 10, 2008 & July 17, 2007.

¹³⁶ Harold W. Furchtgott-Roth, Testimony Before the Antitrust Modernization Commission 5-7 (Dec. 5, 2005) (transcript available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Furchtgott_Roth_statement.pdf).

¹³⁷ For a discussion of merger remedies and the appropriate role of regulatory authorities in it, see Philip J. Weiser, *Re-Examining the Legacy of Dual Regulation: Reforming Dual Merger Review By the DOJ and the FCC*, 61 FED. COMM. L. J. 1 (2008).

Consider, for example, the FCC’s review of the News Corp./DirecTV merger. In the case, the agency stuck to devising competition policy remedies that were necessitated by the merger.¹³⁸ Notably, the Justice Department concluded that the FCC action “addresse[d] the Department’s most significant concerns with the proposed transaction[]” and the FCC’s action justified its decision to close its investigation.¹³⁹ In imposing a set of conditions as part of clearing the merger, the FCC did not adopt a standalone regime that it would be unlikely to enforce, but rather imposed a set of requirements that were harmonized with its existing regulatory requirements.¹⁴⁰ Finally, as for the rules imposed as part of the merger that had no counterpart in the FCC’s regulatory requirements, the agency developed a special procedure of the kind it declined to adopt in the XM/Sirius matter—i.e., it instituted an arbitration regime with appeal to the Commission.¹⁴¹

IV. Toward Data-Driven Decision-Making

The FCC has yet to develop a model of generating information and insights that can inform its policy-making agenda. This Part outlines how the agency could seek to obtain better information, elicit more effective public input, and, finally, enlist the public to play a more constructive role in the agency’s work. First, it highlights the importance of commissioning and publishing research that underlies its conclusions. Second, it calls for a more effective partnership with other resources that can provide valuable analysis and insight. Third, it makes the case for a more self-conscious strategy for developing sources of data. Finally, it explains that there are a number of strategies the agency could use to involve the public in its decisionmaking.

A. A Commitment to Independent Research

The FCC has failed of late to commission, support, and use truly independent research. Over the last several years, this tendency has eroded both the intellectual credibility and legal validity of the agency’s rules. To address this failing, the FCC must commit to seeking out relevant sources of data and engaging in data-driven analysis as well as ending its habit of relying on single points of data that, in many cases, it avoids sharing for analysis and criticism. In so doing, the FCC should re-establish the tradition of an empowered Chief Economist and Chief Technologist, both of whom should be essential parts of an Office of Strategic Planning and Policy Analysis (OSPPA) that develops published working papers to inspire constructive discussions and farsighted analysis. In recent years, both positions have been filled only sporadically and very few OSPPA working papers have been published. Worse yet, the ethic of honest intellectual engagement is treated as a foreign concept, with a widespread belief that employees who “express an opinion, even if based on fact” are subject to being “demoted, reassigned, or hounded out of the agency.”¹⁴²

To begin on a positive note, it merits appreciation that two of the FCC’s signature achievements over the last forty years emerged from independent research commissioned from

¹³⁸ General Motors Corporation & Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, 19 FCC Rcd. 473, at ¶¶ 172-179, at 552-56 (2004) [hereinafter *News Corp. Order*].

¹³⁹ Press Release, US Dep’t of Justice, Justice Department Will Not Challenge News Corp.’s Acquisition of Hughes Electronics Corp. (Dec. 19, 2003) (available at http://www.usdoj.gov/opa/pr/2003/December/03_at_714.htm).

¹⁴⁰ *News Corp. Order*, 19 FCC Rcd at ¶¶ 127-132, at 531-35.

¹⁴¹ *Id.* at ¶ 177, at 553-56.

¹⁴² DECEPTION AND DISTRUST, *supra* note ___, at 21.

outside of the agency. First, consider the case of the *Computer I* decision,¹⁴³ where the FCC sought to protect competition in the data processing industry and keep it free of regulation. To develop its rules in that case, the FCC contracted with the Stanford Research Institute to analyze the comments and develop a proposal for the agency's regulatory strategy. Similarly, in the case of the Part 68 rules,¹⁴⁴ which facilitated competition in the equipment market and ended the almost decade-long effort by AT&T to avoid the letter and spirit of the *Carterphone* decision,¹⁴⁵ the FCC contracted with the National Academy of Sciences to define the relevant interface to the public switched telephone network for terminal equipment. In both cases, the FCC's regulations were upheld by the courts and were a huge success in practice.

The *Computer I* decision is a remarkable FCC decision and an important guide to policymakers for a number of reasons. First, the agency examined in that case an issue in a proactive fashion and sought independent analysis to guide its judgment. Second, the decision reflected a commitment to considering the interests of the innovator who is not before the Commission in a particular proceeding. (The same praise is owed to the FCC's extension of the Part 15 rules to authorize the use of spread spectrum, ultimately leading to the development of wi-fi technology.¹⁴⁶) Finally, the FCC engaged in ongoing reassessment of the effects of the decision, ultimately revising it as the agency evaluated the relevant economic issue and technological changes.¹⁴⁷

Over the last several years, the FCC has encountered increasing judicial hostility and criticism for its management of research related to its decisions. Consider, for example, the FCC's Broadband over Powerline decision.¹⁴⁸ That ruling sought to move to an after-the-fact model of spectrum management, thereby evaluating interference between different users in practice rather than in theory. This effort to generate more real world data emerged from a flawed FCC decision-making process whereby the agency failed to make public the initial spectrum measurements that informed its judgment that this change in regulatory strategy was appropriate. Consequently, the D.C. Circuit reversed the FCC's decision, underscoring that the Administrative Procedure Act requires that agencies make public "the 'technical studies and data' upon which the agency relies" to establish binding regulations.¹⁴⁹ In so doing, the D.C. Circuit revealed some of its impatience with the FCC's operating practices, noting that "[i]t would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment[]"¹⁵⁰ and that "the Commission can point to no authority allowing it to rely on the [unpublished] studies in a rulemaking but hide from the public parts of the studies that may contain contrary evidence, inconvenient qualifications, or relevant explanations of the methodology employed."¹⁵¹

¹⁴³ Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, *Final Decision & Order*, 28 F.C.C.2d 267 (1971).

¹⁴⁴ 47 C.F.R. § 68

¹⁴⁵ Use of the Carterphone Device in Message Toll Telephone Service, *Decision*, 13 F.C.C.2d 420 (1968).

¹⁴⁶ Thomas W. Hazlett, *A Rejoinder to Weiser and Hatfield on Spectrum Rights*, 15 GEO. MASON L. REV. 1031, 1038 (2008).

¹⁴⁷ See Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 129-33 (2003).

¹⁴⁸ *BPL Order*, 19 FCC Rcd. 21,265.

¹⁴⁹ *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).

¹⁵⁰ *Id.* at 237.

¹⁵¹ *Id.* at 239.

The last two media ownership proceedings revealed a similar missed opportunity to generate, evaluate, and utilize thoughtful research. In the 2003 effort to evaluate the optimal regulatory strategy for restricting media ownership, the FCC sought to develop a “Diversity Index” to structure its regulation of the broadcast industry.¹⁵² When the agency adopted its rules, it failed to provide parties a sufficient opportunity to scrutinize and provide feedback about the scope and nature of the Diversity Index. Consequently, the Third Circuit reversed the FCC in *Prometheus Radio Project v. FCC*,¹⁵³ highlighting that:

As the Diversity Index’s numerous flaws make apparent, the Commission’s decision to withhold it from public scrutiny was not without prejudice. As the Commission reconsiders its Cross-Media Limits on remand, it is advisable that any new “metric” for measuring diversity and competition in a market be made subject to public notice and comment before it is incorporated into a final rule.¹⁵⁴

The FCC’s latest media ownership rulemaking (discussed above) did not heed this counsel and essentially repeated the mistake made in its earlier proceeding. In particular, the agency not only did not endeavor to rest its decision on more supportable grounds, it actually ignored the research that the agency itself was developing. As Mark Cooper described the most recent proceeding:

In its haste, the new research agenda devoted little attention to defining and operationalizing the goals of the Communications Act. This tunnel vision ignored efforts by the FCC to understand its policy goals in the period after the court remanded its new media ownership rules. The new agenda led to results-driven research projects. Simply put, the Commission started from the result it wanted and worked backwards.¹⁵⁵

B. An Effective Partnership with Other Governmental, Academic, and Industry Resources

Over the last several years, the FCC has sought to go it alone. Considering that it regulates an industry in which technological change is exploding and in which a wide variety of stakeholders can provide the agency with valuable insights and information, this strategy is misguided. In the years ahead, the agency should seek to engage an array of entities that can enable it to operate more effectively.

First, the agency should re-engage other governmental agencies, non-profit organizations, and academic institutions. With respect to other governmental agencies, it merits note that there are a number of notable agencies with scientific and technical capabilities with whom the FCC should seek more frequent cooperation, including the Commerce Department laboratories and the standard setting expertise at National Institute of Standards and Technology (NIST). On the state

¹⁵² 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report & Order & Notice of Proposed Rulemaking*, 18 FCC Rcd. 13,620 (2003).

¹⁵³ 373 F.3d 372, 384 (3d Cir. 2004).

¹⁵⁴ *Id.* at 412.

¹⁵⁵ Mark Cooper, *Junk Science and Administrative Abuse in the Effort of the FCC to Eliminate Limits on Media Concentration* 5-6 (2008) (unpublished paper presented at the annual meeting of the International Communication Association, available at http://www.allacademic.com/meta/p_mla_apa_research_citation/2/3/3/1/1/p233118_index.html).

and local front, the FCC's abandonment of the State and Local Government Advisory Committee and its lack of relationship with State CIOs both greatly hamper its effectiveness in areas ranging from broadband policy to public safety communications. As for non-profit and academic organizations, the agency can, both by reaching out to them, taking their research more seriously, and seeking to generate data that can enable independent research, enlist them as partners in elevating the level of analysis of critical communications policy issues.

In terms of the private sector, the FCC has a number of opportunities to enlist expertise it is currently leaving untapped. For starters, the agency should once again activate the Technical Advisory Committee that, when it was active, was a valuable sounding board on both broad strategic issues and specific tactical ones.¹⁵⁶ As Russell J. Lefevre, president of IEEE-USA, put it, “[d]espite the generally excellent nature of its internal staff, given all of the technical issues within the FCC’s jurisdiction, it may be prudent to seek means to supplement the internal technical capabilities of the Commission.”¹⁵⁷

C. Collecting and Sharing Data with the Public

To facilitate data-driven decision-making, the FCC must develop a more coherent and comprehensive commitment to collecting relevant data. At present, the agency lacks the most basic data about how the wireless spectrum is being used and where broadband services are available, for example. Moreover, the agency has failed to make the information it does have in an easily accessible form that can invite outside parties to analyze it and remix it in interesting ways. This failing is not just a missed opportunity. Rather, it fundamentally undermines the agency’s ability to execute on its mission. With respect to the prices paid for high capacity lines by businesses (so-called “special access pricing”), for example, the GAO excoriated the FCC’s lack of data that, as it put it, is necessary to determine whether the agency’s “deregulatory policies are achieving their goals.”¹⁵⁸ In short, the FCC has not developed an effective strategy either for collecting data or distributing it.¹⁵⁹

On the broadband front, there are huge opportunities for the FCC’s data collection efforts to play an important role in public policy development. To date, the FCC has abdicated that responsibility, setting up a measurement regime in 1998 (which defined broadband as “200 kilobits” and measured availability by whether anyone in a zip code has broadband service) and leaving that system unchanged for a decade.¹⁶⁰ In the absence of FCC leadership on this front,

¹⁵⁶ For a broad discussion about how such bodies are and can best be used, see BRUCE L. R. SMITH, *THE ADVISERS* (1992).

¹⁵⁷ IEEE-USA Sends Letter to FCC Urging Improvements in Consideration of Technical Issues, <http://spectrumtalk.blogspot.com/2008/06/ieee-usa-sends-letter-to-fcc-urging.html> (June 6, 2008 11:39 EST)

¹⁵⁸ GAO, *FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES 1* (2006).

¹⁵⁹ See Philip M. Philip & Joe Karaganis, *Towards a Federal Data Agenda for Communications Policymaking* (2008) (McGannon Center Working Paper, available at <http://programs.ssrc.org/media/dataconsortium/dataagenda>; David Robinson et al., *Government Data and the Invisible Hand*, 11 *YALE J.L. & TECH.* (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138083.

¹⁶⁰ In 2008, the FCC finally did revise its decade long measurement procedure, but that revised model will not go into effect until 2009. Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol (VOIP)

different states took up the mantle of broadband policy, emphasizing the importance of broadband measurement and mapping and proceeding without the benefit of federal guidance or support.¹⁶¹ Just recently, Congress unanimously passed the Broadband Data Improvement Act, requiring the FCC to take such a leadership role in this area.¹⁶²

In addition to evaluating the extent of broadband deployment, the FCC (and/or the FTC) could also help to more clearly define level of broadband service and educate consumers in broadband markets as to what they should expect from their provider.¹⁶³ Today, for example, no effective disclosure regime exists to make clear what degree of “latency” (or delay) exists in broadband networks or what “up to 1 megabit per second” really means. With a better understood disclosure regime in place, providers would be pressured to compete more vigorously along quality dimensions (as opposed to merely price). Indeed, competition for lower calorie, lower sodium, or lower fat foods only emerged once an understandable disclosure regime for nutritional information was developed and implemented.¹⁶⁴

The FCC’s decision to end the collection of some quality measures in telephone markets suggests a lack of appreciation for the point that, especially in competitive markets, sunlight on the services offered by providers is even more important. In making this decision, the FCC concluded that the absence of similar obligations on other carriers rendered the legacy regime suspect.¹⁶⁵ In short, this Order heads in the wrong direction. The right question is how can the agency develop a systematic portrait of the marketplace so that its data collection efforts are accurate, can inform consumers, and can enable data-driven policymaking in a sound and prudent manner.¹⁶⁶

Subscribership, *Report & Order & Further Notice of Proposed Rulemaking*, 23 FCC Rcd. 9691, 9762-63 (2008).

¹⁶¹ PHILIP J. WEISER, A FRAMEWORK FOR A NATIONAL BROADBAND POLICY 14-15 (2008) (discussing Connect Kentucky and California initiatives).

¹⁶² Martin H. Bosworth, *Congress Passes Broadband Data Improvement Act*, CONSUMERAFFAIRS.COM, Oct. 2, 2008, http://www.consumeraffairs.com/news04/2008/10/congress_broadband.html.

¹⁶³ For a discussion as to how such an effort could operate, see *The Next Frontier for Network Neutrality*, 50 ADMIN. L. REV. 273 (2008).

¹⁶⁴ As Ellen Goodman related,

[I]t seems natural that food manufacturers with a relatively good nutritional story to tell would disclose nutritional information. Kraft and Nabisco could then compete on nutritional value or Kraft could use nutritional information to distinguish its premium brands like Progresso. So one might think, and yet the market did not produce widespread disclosure of nutritional information until federal regulation required it. It was the regulation that created a market for nutritional information that now appears to be strong.

Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 139 (2007); see also Archon Fung et al., *The Political Economy of Transparency: What Makes Disclosure Policies Effective?* 16-17 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=766287 (noting competition based on nutritional information after government regulation set forth framework for disclosure).

¹⁶⁵ Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering, *Memorandum Opinion & Order & Notice of Proposed Rulemaking*, WC Dkt. No. 08-190, 2008 WL 4148882 (2008).

¹⁶⁶ The lack of effective information collection by the FCC creates “information vacuums that hamper just the kinds of analyses that have become an increasingly prominent part of contemporary media policymaking[.]” thereby undermining the agency’s ability to engage in data-driven decision-making. Philip M. Napoli, *Paradoxes of Media Policy Analysis: Implications For Public Interest Media Regulation* (2008) (McGannon Center Working Paper, available at http://fordham.bepress.com/cgi/viewcontent.cgi?article=1000&context=mcgannon_working_papers).

On the wireless spectrum front, it is widely appreciated that spectrum is both a valuable and underused resource. One challenge in facilitating the development of a robust secondary market is that many would-be lessors of spectrum licenses do not know who to contact. Thus, an initial challenge for the FCC is to establish a user-friendly spectrum registry that identifies the different bands of spectrum, a contact person, and stated terms for leasing access to spectrum.¹⁶⁷ By posting this information, the FCC would enable entrepreneurs, policymakers, and ordinary citizens to evaluate both potential policy reforms and new business strategies.

In developing new databases of information, it is not sufficient merely to make them available to the public—the FCC also should enable citizens to manipulate information and use it in creative ways.¹⁶⁸ At present, unfortunately, the FCC databases are not only difficult to search, but they do not give citizens the opportunity to use that data and make connections between different data sets—say, broadband deployment and job creation. Consequently, the agency has failed to spur what one commentator calls “wikinomics”—i.e., enabling user-generated content.¹⁶⁹ This trend is just now taking root, as groups of ordinary citizens are combining information related to a variety of topics, ranging from crime rates in Chicago neighborhoods and L.A. communities at risk of fire violations, using technologies like Google Maps to make interesting connections.¹⁷⁰

Over the last several years, the FCC has often viewed the job of engaging the public as a chore, not a responsibility and opportunity. Significantly, the public should not merely be viewed as interested and informed consumers—say, individuals interested in the best opportunities to purchase broadband connections—but also engaged citizens. Improving the transparency of how the agency operates, upgrading its website to make it more usable, and involving the public in data collection on matters ranging from spectrum use to broadband deployment are all important steps. But such steps must also be followed up with efforts to engage the public.

In soliciting public engagement, the FCC should seek to find ways of getting feedback that is most conducive to shaping regulatory policy. Consider, for example, the difference between a short email expressing an opposition to media consolidation as opposed to a more developed reaction to a specific proposal. To be sure, a large number of emails expressing a basic level of opposition to a particular course of action is a very valuable signal. To help justify its action, however, the agency must develop well reasoned arguments, ranging from ones offered at hearings where information is first presented to citizen panels where individuals can deliberate on issues like a jury and offer their views as a body.¹⁷¹

¹⁶⁷ To its credit, the FCC has recognized that such a registry would help facilitate effective spectrum trading, but has not developed one. In particular, the FCC has concluded that intensive spectrum leasing within the existing administrative regime “would require tradeoffs in multiple dimensions—e.g., time, space, geography, type of use, and technology—and that, in the absence of an effective facilitator, search costs would be high.” Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report & Order & Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 20,604, 20,692 (2003).

¹⁶⁸ See Robinson, *supra* note 159.

¹⁶⁹ DON TAPSCOTT & ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING (2006).

¹⁷⁰ L. Gordon Crovitz, *Information Age: From Wikinomics to Government 2.0*, WALL STREET JOURNAL, May 12, 2008, at A13.

¹⁷¹ See Nou, *supra* note 88, at 617-24; *id.* at 621 (“citizen deliberation is particularly important when valuing goods that are politically salient or that resonate with social meaning, lest the decision be—or be perceived to be—left to unelected technocrats.”).

V. Conclusion

The current policymaking tools and apparatus used at the FCC are broken. Rebuilding the agency's culture will require not only the right leaders for a new era, but a systematic re-examination of the agency's institutional processes with an eye towards building a new culture. In this respect, the reshaping of how the agency operates will be equally challenging and important to the substantive issues that the agency will address in the years ahead.

The enormity of the challenge in reforming the FCC leads some, like Lawrence Lessig, to call for the abolition of the agency. As Lessig sees it, “[y]ou can’t fix DNA.”¹⁷² In taking this view, Lessig both understates the concomitant challenge of building a new institutional culture that reflects the values discussed herein as well as overstates the impossibility of reform from within. Indeed, like the FTC’s impressive re-examination and re-building of its institutional culture over the last 25 years, the FCC has an important opportunity to both pay close attention to and address its institutional failings. Given the FCC’s critical role in our information economy, it is critical that the FCC change the way it conducts its business—whether through internal reform or abolition—and policymakers and scholars must take seriously the importance of engaging in this debate as to the FCC as well as to other regulatory agencies that suffer similar defects.

¹⁷² See Lessig, *supra* note __.