ARTICLES

INSTITUTIONAL DESIGN, FCC REFORM, AND THE HIDDEN SIDE OF THE ADMINISTRATIVE STATE

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> We are in danger of becoming prisoners of our own procedures in the administrative process.
> —Newton N. Minow, FCC Chairman, 1961–63[1]

Administrative law has yet to grapple with its most fundamental challenge. Today, administrative agencies are more significant than common law courts, leading Cass Sunstein to conclude that "[a]s a matter of simple practice, administrative agencies have become America's common law courts."[2] Consequently, legal scholars have focused considerable attention on the substantive rules generated by administrative areas, ranging from environmental law to health and safety regulation to telecommunications policy. At the same time, traditional administrative law scholars have generally focused on the rules governing federal court review of agency decisionmaking. What remains off the agenda, however, is the equally, and perhaps more, important question of how administrative agencies actually develop the rules that are evaluated on appeal.

In studying the modern administrative state, legal scholars have failed to examine the questions related to institutional competence and structure that determine whether administrative regulation can be effective.[3] At the dawn of the administrative state, this type of inquiry was taken seriously by scholars.[4] Of late, however, it has fallen out of fashion. To make the case for evaluating how administrative agencies actually operate, this Article evaluates the institutional failings of the Federal Communications Commission (FCC or Commission), arguing that these failings are even

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

2. Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1068 (1998). For a discussion of the turn from courts to agencies as the primary driver of legal policy decisions, see Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1716–26 (2001).

3. Unfortunately, the complaint of law professor and former Federal Communications Commission (FCC) Commissioner Nick Johnson lodged over a quarter century ago still holds: "Rather than seeking methods for improving the administrative process to avoid unsound, unfair, and arbitrary decisions, scholars have focused almost exclusively on the role of the courts in supervising and reviewing agency action." Nicholas Johnson, *The Second Half of Jurisprudence: The Study of Administrative Decisionmaking*, 23 STAN. L. REV. 173, 174 (1970) (reviewing KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969)).

4. *See, e.g.*, Kenneth Culp Davis, *Institutional Administrative Decisions*, 48 COLUM. L. REV. 173 (1948) (examining the strengths and weaknesses of agency adjudication processes); A.H. Feller, *Prospectus for the Further Study of Federal Administrative Law*, 47 YALE L.J. 647 (1938) (arguing that, between mere hostility to, defense of, and general misunderstanding of the administrative system, scholars must make serious attempts to understand the justifications for the administrative state).

more significant than the substantive policy issues superintended by that agency. In so doing, this Article explains how institutional processes can often dictate or distort substantive outcomes.

The institutional failings of the FCC have long escaped careful review in both scholarly and popular discussions about the agency. For years, the agency has maintained a level of mystery and secrecy over both what issues it chooses to consider and how it considers them. In particular, the agency has relied on the ex parte process at the expense of the formal notice-and-comment procedure. Moreover, it has utilized a limited degree of collegial discussion between the commissioners and the public in making its decisions. The result of such broken procedures is that the FCC operates in a dysfunctional fashion and fails to grapple effectively with the critical issues it is charged with addressing.

After years of neglecting the FCC's institutional flaws, 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,[5] and the House Commerce Committee majority released a report citing serious failings in the operations of the agency.[6] As for public commentaries, law professor Lawrence Lessig has responded to the criticisms of the agency by calling for its abolition.[7]

In response to the congressional interest in institutional reform at the FCC, former Chairman Kevin Martin disclaimed the need for any legislative action, adjusted some of the FCC's operating procedures, and defended the agency on the grounds that his tactics were similar to those of

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5. Letter from John D. Dingell, Chairman, House Comm. on Energy and Commerce, to Kevin J. Martin, Chairman, Fed. Commc'ns Comm'n (Dec. 3, 2007), 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*, MULTICHANNEL NEWS, 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.'" (quoting Sen. Rockefeller)).

6. *See* MAJORITY STAFF, HOUSE COMM. ON ENERGY AND COMMERCE, 110TH CONG., DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J. MARTIN (2008), http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc%20majority%20staff%20report%20081209.pdf [hereinafter DECEPTION AND DISTRUST] (finding that the FCC suffers from significant transparency and management issues).

7. Lawrence Lessig, *Reboot the FCC*, NEWSWEEK.COM, Dec. 23, 2008, http://www.newsweek.com/id/176809.

his predecessors.[8] Whether Martin's management style is 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 FCC Commissioner Glen Robinson noted over forty years ago, "Few agencies of Government have been so doggedly pursued by critics as the FCC."[9] Former FCC 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."[10] In short, the question is not whether to reform the agency's operations, but how to do so.

Even with an awareness of the importance of institutional processes, there is a powerful pull at policymakers and scholars to focus solely on the substantive issues on an agency's agenda: spectrum policy reform, network neutrality, and universal service policy in the case of the FCC. This approach, however, overlooks the fundamentally important point that institutional processes shape the ability of an agency to be an effective regulator for the public interest.[11] In the case of the FCC, its current lack of data-driven decisionmaking 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.[12]

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8. 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 Chairman Abused Power, House Probe Finds*, WASH. POST, Dec. 10, 2008, at D1 (quoting Consumer Union's Gene Kimmelman).

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

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

11. In explaining his commitment to a serious evaluation of the Federal Trade Commission's (FTC's) institutional processes (as part of an "FTC at 100" study), Chairman Bill Kovacic explained,

> The 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, Aug. 2008, at 8, http://www.abanet.org/antitrust/at-source/08/08/Aug08-KovacicIntrvw8=6f.pdf.

12. *See* 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

This Article proceeds in six parts. Part I briefly describes the long-standing 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 decisionmaking processes. Part V highlights, using the analysis of the FCC as a case study, the need for administrative law scholars to evaluate the importance of institutional structure, competence, and process. Finally, this Article offers a short conclusion.

I. BACKGROUND

The FCC is a good case study for how a regulatory commission operates because it oversees an important and large segment of the economy and its operations are deeply flawed, with many claiming that its acronym stands for "from crisis to crisis."[13] In theory, an administrative agency like the FCC should be able to evaluate alternative regulatory strategies and take a holistic perspective to its policymaking mission. In practice, however, the agency is constrained by its tendency to view 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

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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.

Posting of Richard Posner to Becker–Posner Blog, http://www.becker-posner-blog.com/archives/2008/04/reregulate_fina.html (Apr. 28, 2008, 12:35 EST).

13. *See, e.g.*, James H. Quello, Comm'r, Fed. Commc'ns Comm'n, Remarks at the John Bayless Broadcast Foundation Annual Banquet (Oct. 30, 1996), http://www.fcc.gov/Speeches/Quello/spjhq608.txt (remarking that the institutional structure of the FCC is often slow to confront emerging challenges).

to matters that come before it—as well as the less elevated aspects of the legislative process: engaging in political dealmaking and rewarding those with influence. The challenge for the agency—and for scholars analyzing it—is to evaluate how to combine the best of both traditions, i.e., drawing on the Judiciary's legacy of impartiality and data-driven decisionmaking and the Legislative Branch's ability to view issues in a broad and strategic manner. This Part thus first provides some background on how the agency operates, then discusses its political culture, and concludes by highlighting some avenues for institutional reform.

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. As an initial matter, the agency's "public interest" standard is notoriously flexible, open-ended, and susceptible to legislative-like decisionmaking.[14] Moreover, the agency's operations and institutional habits were shaped by its early statutory assignments. One critical role the FCC traditionally played was making the inherently political judgments of who had the right to use particular radio frequencies. As a historical matter, 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, using comparative hearings to select the best applicant. In some cases, this process was famously used to benefit those with political connections—including then-Congressman Lyndon Johnson's wife[15]—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).[16] In all cases, the agency was limited in its ability to use judicial-like processes because, as noted economist Alfred Kahn put it, "The dispensation of favors to a selected few is a political act, not a judicial one."[17]

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14. As such, some have questioned the constitutionality of the FCC's statutory mandate. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 429–30 (2001) (noting the FCC's broad use of the public interest standard and arguing that the standard is inconsistent with constitutional separation of powers principles).

15. ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT 82–95 (1990).

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

17. 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 Chairman Newton Minow captured the prevailing conclusion in stating that "it is largely true that the

A second critical and formative role of the FCC was to regulate natural monopolies. This project often entailed an 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."[18] In the assessment of Judge Posner, this model of regulation involved a cozy relationship between the two parties, but not necessarily because the regulator was captured by or subject to political forces. Rather, as Posner saw it, the agency's regulatory regime allowed (or even encouraged) the interests of the regulator to become intertwined with the conduct of the regulated firm that participated in an agency program—such as the protection of universal service—through a process that he called "taxation by regulation."[19]

The FCC's legacy of command-and-control regulation and political favoritism has often steered the agency toward 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."[20] In reviewing the spectrum management decisions 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."[21] Moreover, in another criticism that holds equally true today, Johnson noted that the FCC generally fails to utilize any of its own insights or independent research,

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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.

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

19. 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) (analyzing and critiquing the "public interest" theory of government regulation).

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

21. *Id.* at 528. For my own suggestions on spectrum policy reform, see Philip J. Weiser, *The Untapped Promise of Wireless Spectrum* (Hamilton Project, Brookings Inst., Discussion Paper No. 2008-08, 2008), http://www.brookings.edu/~/media/Files/rc/papers/2008/07_wireless_weiser/07_wireless_weiser.pdf (arguing that the FCC should measure how spectrum is used, identify blocks of unused spectrum, and encourage flexibility in leasing and licensing to utilize unused spectrum).

relying "almost exclusively upon information and analysis supplied by [the parties that appear before it]."[22]

The FCC's tendency to engage in ad hoc decisionmaking—which goes hand in hand with a lack of any serious effort at strategic planning—has perennially attracted criticism. In 1949, former President Herbert Hoover—who as Commerce Secretary was largely responsible for the establishment of the Federal Radio Commission, which 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."[23] 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."[24] Despite such criticisms, the FCC's practice of ad hoc decisionmaking has remained largely intact.

To appreciate the costs of a lack of strategic planning, consider the 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 transformed an array of communications technologies, from video programming to cell phones to international voice communications. As Commissioner Johnson explained, 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 ABC.[25] Consequently, the FCC began its analysis of that matter by debating whether to grant the request without first carefully evaluating the appropriate regulatory strategy. Fortunately, as Johnson described it, "The 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 substantial investment that followed the FCC's decision.[26] That concept, in short, led to proposals for funding the Public Broadcasting Service that, but for the Ford Foundation's intervention, the

22. Johnson, *supra* note 20, at 530.

23. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, TASK FORCE REPORT ON REGULATORY COMMISSIONS 95 (1949).

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

25. *See* Johnson, *supra* note 20, at 530 (describing the formulation of proceedings authorizing domestic satellite use).

26. *Id*.

Commission would have overlooked.

For another case illustrating the costs of the FCC's lack of strategic planning and its inability to act proactively, consider the decision to authorize cellular telephone 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.[27] Consequently, neither the FCC nor AT&T pushed the matter aggressively, leading to a "slow rolled" authorization, which cost American consumers, by one account, $33 billion in lost productivity gains.[28]

Flowing in part from the agency's tendency to approach issues in a reactive and ad hoc manner, the FCC also often fails to address issues in an intellectually defensible and careful manner. One notable and famous such case arose from the agency's reevaluation of the financial interest and syndication (finsyn) rules, which restricted the ability of broadcast networks to produce TV programming.[29] Originally, these rules were seen as providing important protections for independent TV producers, but over time the rules increasingly appeared 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. The FCC wrote a long opinion deciding to keep the rules in place that Judge Posner, in overturning it on appeal, famously remarked was "like a Persian cat with its fur shaved . . . alarmingly pale and thin."[30] 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."[31]

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,

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27. 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).

28. Jerry A. Hausman, *Valuing the Effect of Regulation on New Services in Telecommunications*, *in* BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 1, 23 (Martin Neil Baily et al. eds., 1997).

29. *See* Schurz Commc'ns, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992) (holding that new finsyn rules were arbitrary and capricious).

30. *Id.* at 1050.

31. *Id.*

suggested that the acronym "FCC" stands for "Firmly Captured by Corporations,"[32] while former FCC Chief Economist Tom Hazlett counters that "FCC" stands for "Forever Captured by Corporations."[33] Contrary to these suggestions, the FCC's 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, it is the agency's institutional limitations—a failure to approach issues strategically, to develop independent solutions, and to anticipate issues ahead of particular crises—that often lead it to miss opportunities to chart independent courses of action like the one identified by the Ford Foundation as to satellite policy. To highlight this issue, the next section discusses three recent case studies in which the agency 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 political culture described above as well as the institutional failings long cited by critics of the agency. In just the second half of 2007, the processes used in three high profile and important proceedings—the open access rules imposed as part of the 700 Megahertz (MHz) auction, the proposed regulations on cable providers based on a finding of adoption of cable services by 70% of consumers, and the media ownership rules—all illustrate the problematic nature of how the FCC often operates. The portrait of agency dysfunction raised by these three proceedings makes plain the nature of the agency's institutional failings, highlights how it can ultimately undermine the success of policymaking initiatives, and provides 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.[34] 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

32. Hundt, *supra* note 18.

33. Drew Clark, *Industry Experts Disagree on Best Path to Improve FCC*, TECHNOLOGY DAILY, Mar. 24, 2005, http://www.nationaljournal.com/pubs/techdaily/pmedition/2005/tp050324.htm.

34. Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, 22 F.C.C.R. 8064 (2007) (report and order and further notice of proposed rulemaking) (explaining the need to revise access rules to expand 700 MHz spectrum availability and establishing new licensing regulations).

some action along these lines.[35] 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),[36] everybody scrambled, a circus ensued and a compromise, *a clearly political compromise*, was ultimately made."[37] Consequently, the debate over the proposal was hurried and conducted via vague and 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.[38]

The rushed nature of the FCC's deliberation and decisionmaking 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.[39] Using the Google Public Policy Blog as a means of shedding sunlight on this effort to raise the issue anew, 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."[40] Ultimately, the FCC declined to change its rules in response to this effort.[41]

The second proceeding that merits examination is the effort 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

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35. *Id.* at 8086 (noting the debate concerning adopting additional rules to promote secondary market transactions).

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

37. IP Democracy, http://www.ipdemocracy.com/archives/2007/09/13/#002651 (Sept. 13, 2007, 23:15 EST); *see also* IP Democracy, http://www.ipdemocracy.com/archives/2007/09/05/#002640 (Sept. 5, 2007, 09:17 EST) ("Martin never made his proposal public and everybody was working off of press reports and rumors.").

38. Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, 22 F.C.C.R. 15,289 (2007) (second report and order) (addressing several issues left untouched by the initial Report and Order and Further Notice of Proposed Rulemaking).

39. *See* Posting of Richard Whitt to Google Public Policy Blog, http://googlepublicpolicy.blogspot.com/2007/10/pro-consumer-spectrum-auction-rules-at.html (Oct. 3, 2007, 14:29 EST) (noting that in the wake of the revised 700 MHz auction rules, Verizon Wireless lobbied the FCC to restrict consumer choice provisions of the rules).

40. *Id.*

41. According to one account, this decision was not for lack of trying by Chairman Martin. *See* Jeffrey Silva, *Martin Working to Revise 700 MHz Open-Access Provisions*, RCRWIRELESS, Sept. 26, 2007, http://www.rcrwireless.com/article/20070926/SUB/70926006/Martin-working-to-revise-700-MHz-open-access-provisions.

providers if they serve 70% of the country and have 70% of subscribers in that territory with thirty-six or more activated channels available to them.[42] 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 reaches a lower level than 70% (with satellite TV and over-the-air TV serving the rest).[43] In compiling its regular report evaluating the multichannel 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 (from a company that later repudiated its own figure) and sought to suppress other relevant information.[44] 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 examine 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 examining the FCC's processes found, "All 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."[45] To some observers, this tactic merely reflected Chairman Martin's operating style of keeping "his plans tightly wrapped, believing there's a tactical advantage in springing them on other commissioners with little notice."[46]

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

42. 47 U.S.C. § 532(g) (2000).

43. Press Release, Fed. Commc'ns Comm'n, FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report (Nov. 27, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf.

44. *See* Hearn, *supra* note 5 ("Not only did [Chairman Martin] rely on one and only one data source—which turned out to be unreliable—but he was also nabbed suppressing FCC-generated data that flatly contradicted his assertions about the level of cable penetration.").

45. DECEPTION AND DISTRUST, *supra* note 6, at 13.

46. Jim Puzzanghera, *supra* note 12.

> 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.[47]

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.[48]

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 *New York Times* op-ed (rather than in a Further Notice) only a little over a month before he asked his fellow commissioners to vote on the proposal.[49] 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."[50] In defense of this tactic,

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47. Statement of Jonathan S. Adelstein, Comm'r, Fed. Commc'ns Comm'n, Re: Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, MB Docket No. 06-189, Thirteenth Annual Report (Nov. 27, 2007), at 1 http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A4.pdf.

48. 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

> [i]nterestingly, 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 Robert M. McDowell, Comm'r, Fed. Commc'ns Comm'n, Dissenting in Part, Re: Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, MB Docket No. 06-189, Thirteenth Annual Report (Nov. 27, 2007), at 1, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A6.pdf.

49. Kevin J. Martin, Op-Ed., *The Daily Show*, N.Y. TIMES, Nov. 13, 2007, at A29.

50. *Federal Communications Commission Oversight Hearing Before the S. Comm. on Commerce, Science & Transportation*, 110th Cong. 2 (2007) (testimony of Jonathan S. Adelstein, Comm'r, Fed. Commc'ns Comm'n), 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 because, among other reasons, they were adopted without sufficient public

Chairman Martin stated that the FCC adhered to its traditional practices in this proceeding.[51]

In the media ownership proceeding, the Commission announced its decision in a twelve-page press release a week before Christmas 2007.[52] At that time, Commissioners Copps and Adelstein protested both the substance and the process used to develop the rules. In particular, Commissioner Copps recounted that the FCC engaged in the last-minute charade of pretending to allow input via a public hearing in Seattle (to 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 the 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 Copps 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 [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.[53]

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notice to allow careful deliberation and examination of their weaknesses. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 409–12 (3d Cir. 2004) (remanding regulations to the FCC for further consideration because the Commission's notice that it planned to create a "new metric" to "reformulate [its] mechanism for measuring diversity and competition in a market," and the fact that the commission was "contemplating 'design[ing] a test that accords different weights to different outlet types,'" did not allow public scrutiny of the regulations which were adopted, prejudicing the appellants).

51. *See Federal Communications Commission Oversight Hearing Before the S. Comm. on Commerce, Science & Transportation*, 109th Cong. 4 (2007) (written statement of Kevin J. Martin, Chairman, Fed. Commc'ns Comm'n), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278904A1.pdf ("[A]lthough not required, I took the unusual step of publishing the actual text of the one rule I thought we should amend.").

52. Press Release, Kevin J. Martin, Chairman, Fed. Commc'ns Comm'n, Media Ownership (Dec. 18, 2007), http://www.fcc.gov/kjm121807-ownership.pdf (explaining adoption of media ownership rules).

53. Statement of Michael J. Copps, Comm'r, Fed. Commc'ns Comm'n, Concur in Part, Dissent in Part, Promoting Diversification of Ownership in the Broadcasting Services 2 (Dec. 18, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-217A3.pdf [hereinafter Copps Statement].

Finally, in a practice that is all too common at the FCC, the agency did not release its opinion and final rules until almost three months after the vote,[54] leaving affected parties to guess what the actual opinion discussed, allowing a shadow lobbying process to attempt to influence the ultimate opinion after the FCC announced its decision and raising questions about the legitimacy of its action. 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 the proceedings on his preferred terms.[55]

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."[56] 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

54. Promoting Diversification of Ownership in the Broadcasting Services, 23 F.C.C.R. 5922 (2008). 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, 23 F.C.C.R. 2010 (2008).

55. In particular, Commissioners Copps and Adelstein noted upon the release of the newspaper–broadcast cross-ownership rule,

> 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, Fed. Commc'ns Comm'n, Joint Statement by Fed. Commc'ns Comm'n Comm'rs Michael J. Copps and Jonathan S. Adelstein on Release of Media Ownership Order 1 (Feb. 4, 2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280001A1.doc.

56. IP Democracy, http://www.ipdemocracy.com/archives/2007/11/28/#002781 (Nov. 28, 2007, 06:42 EST). Commissioner Copps offered similar assessments as to how the media ownership proceeding was conducted, explaining in his dissenting opinion,

> 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 53, at 3.

go-ahead from the top."[57]

C. The Possibility of Regulatory Reform

Shakespeare famously wrote that "what's past is prologue."[58] At the FCC, that might well be the case. Nonetheless, scholars and policymakers need not view it as inevitable that the agency will continue to use broken procedures. As emphasized by the teachings of new institutional economics, institutional strategies matter and "organizations can be structured to optimize the benefits and costs of expert decisionmaking."[59] 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.[60]

For an example of how a regulatory agency can change in terms of its operating procedures, consider the Civil Aeronautics Board (CAB). Historically, that agency's operating procedures failed to spur deliberation and data-driven decisionmaking. 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."[61] Reflecting his commitment to transparency and open debate, he systematically changed how the agency operated, starting

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57. Matthew Lasar, *FCC Insider: This Place Is Hell; Silent Protest Planned*, ARS TECHNICA, Mar. 16, 2008, http://arstechnica.com/tech-policy/news/2008/03/fcc-insider-this-place-is-hell-silent-protest-planned.ars. Reportedly, an FCC staff person related the following:

> "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."

Id.

58. WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1.

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

60. *Id.* at 561–62.

61. Philip J. Weiser, *Alfred Kahn as a Case Study of a Political Entrepreneur*, 7 REV. NETWORK ECON. 603, 607 (2008), http://www.rnejournal.com/artman2/uploads/1/weiser_RNE_dec08.pdf (footnote omitted). 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 cliches—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.

MCCRAW, *supra* note 17, at 286.

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 (FTC), 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.[62] In particular, over the last twenty-five 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.[63] Two successful recent FTC Chairs, Robert Pitofsky and Timothy Muris, both were successful political entrepreneurs who effectively utilized strategic planning and a positive agenda to lead the agency. Both Pitofsky and Muris focused on important opportunities, such as confronting the Internet as an important social and economic force as well as spearheading the enactment of the Do Not Call list regulations. The Chairs' actions ensured, as Timothy Muris put it, that the agency was not merely a "passive observer, swept along by external developments and temporary exigencies."[64] The agency's ability to implement such an agenda and reestablish its value to the nation underscored the wisdom of giving it a 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.[65]

For a final example of how an agency can change, consider the case of Ofcom, the United Kingdom (UK) communications industry regulator. Prior to the establishment of Ofcom, observers complained about the operation of one of its predecessor agencies, the Independent Television Commission (ITC). Notably, those complaints parallel how the FCC operates today. As one regulated entity noted,

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62. MCCRAW, *supra* note 17, at 126–27.

63. As FTC Chairman 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 Rep. 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).

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

65. Former FTC Commissioner Philip Elman, for example, concluded in the early 1970s that the "best thing to do would be to start all over again, abolish the [C]ommission and set up a new agency." NORMAN I. SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN 368 (2004).

> [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.[66]

In 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 committed to the proposition that gathering evidence and making data-driven decisions is "part and parcel of effective regulation."[67]

II. TOWARD A NEW INSTITUTIONAL STRATEGY

Thoughtful leadership can help to change an agency's culture and commit to serious strategic thinking and planning. To be successful, the agency's leadership must overcome the tendency toward making reactive judgments at both the macro-level, in terms of what issues the agency prioritizes, as well as on the micro-level, in how the agency conducts and manages its particular proceedings. With respect to the FCC, it 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.[68] 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 are sophisticated at 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.[69]

Going forward, the FCC has the opportunity to set a strategic agenda and

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

67. *Id*. at 4.

68. 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 24, at 53.

69. 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." *Id.*

commit to procedures that ensure a high level of transparency. On the strategic level, the FCC needs to establish a preset 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.[70] All too often, the FCC approaches these topics in an isolated fashion—for example, 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 in a hurried fashion.[71] 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 decisionmaking is that it often makes important judgments with limited data, an artificially constrained set of alternatives, and, in many cases, a penchant for delay. As is evidenced in a number of cases (including the ones discussed in 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.[72] 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 depend on FCC decisions (like 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 (through, for example, judicial review), the lack of investment and innovation that ensues from an absence of predictable, expeditious, and

70. Former Chairman Hundt and Greg Rosston suggested a similar approach, albeit one that would also involve the Department of Justice. *See* Hundt & Rosston, *supra* note 10, at 34.

71. Former FCC Chairman Newton Minow claims that this failure is endemic to the multimember 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 Securities and Exchange Commission (SEC) and the FTC, do not face this systemic problem despite their need to operate as a collegial body.

72. Former FCC Commissioner Johnson bemoaned this state of affairs by highlighting that if the Commission precommitted to clear goals, methodologies, and constrained its discretion through a commitment to transparent institutional processes, "The 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, *supra* note 3, at 179.

reasoned decisionmaking invariably remains unaddressed and constitutes a loss to the economy and society as a whole.

A. Strategic Agenda Setting

To appreciate the overall lack of strategic agenda setting at the FCC, compare 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 are released 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.[73] 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.[74]

The European Union 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.[75] In a case closer to home, consider how the FTC has used a systematic effort to increase its knowledge base on emerging issues such as

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73. For the European Commission'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), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1422&format=HTML&aged=0&language=EN&guiLanguage=nl. For the background working paper, see Comm'n of the European Cmtys., Early Challenges Regarding the "Internet of Things" (Working Document, 2008), http://ec.europa.eu/information_society/policy/rfid/documents/earlychallengesIOT.pdf.

74. COMM'N OF THE EUROPEAN CMTYS., COMMUNICATION ON FUTURE NETWORKS AND THE INTERNET 10–11 (2008), http://ec.europa.eu/information_society/eeurope/i2010/docs/future_internet/act_future_networks_internet_en.pdf.

75. *See, e.g.*, OFCOM: OFFICE OF COMMUNICATIONS, A CASE STUDY ON PUBLIC SECTOR MERGERS AND REGULATORY STRUCTURES (2006), http://www.ofcom.org.uk/about/accoun/case_study/case_study.pdf (addressing, among other matters, the politics and legislation, public engagement, and governance issues surrounding Ofcom's development and future public-sector mergers).

behavioral advertising.[76] 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.[77] Resulting from that investigation, the FTC hosted a town hall discussing behavioral advertising.[78] 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.[79] 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.

It merits noting 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."[80] In his vision document, Chairman Kennard highlighted the importance of identifying high-level strategic priorities and specific measures that the agency aims to implement. Notably, he focused on the value of moving away from classic technology-based distinctions, urging the Commission to focus instead on "universal service, consumer protection and information; enforcement and promotion of pro-competition goals domestically and internationally; and spectrum management."[81] Kennard's list 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,

76. 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 64, at 176–79 (detailing the FTC's efforts to increase their knowledge base, including holding multi-day workshops and fact-finding hearings).

77. Federal Trade Commission, Protecting Consumers in the Next Tech-Ade, http://www.ftc.gov/techade (last visited Oct. 31, 2009).

78. Federal Trade Commission, 2007 FTC Workshop: Ehavioral Advertising, http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml (last visited Oct. 31, 2009).

79. *See generally* FED. TRADE COMM'N, ONLINE BEHAVIORAL ADVERTISING: MOVING THE DISCUSSION FORWARD TO POSSIBLE SELF-REGULATORY PRINCIPLES (2007), http://www.ftc.gov/os/2007/12/P859900stmt.pdf.

80. WILLIAM E. KENNARD, A NEW FEDERAL COMMUNICATIONS COMMISSION FOR THE 21ST CENTURY (1999), http://www.fcc.gov/Reports/fcc21.pdf.

81. *Id.* at 1.

if at all, in applying these principles," such as the historic commitment to open architecture and interconnection in "a world where competition will largely replace regulation"[82]—it failed to provide any framework to generate answers for these questions or a 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 *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,[83] as Kennard had begun to do by consolidating the agency's enforcement and public information functions in a stand-alone bureau.[84] Although Powell did not take any transformational steps to align the agency's operations along functional lines, he did take the important step of recognizing the impact of technological convergence by merging the separate Mass Media and Cable Bureaus.[85] 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.[86] He did not, however, offer any "meta" strategy for how the agency would approach these policy domains.

In the important area of spectrum reform, Chairman Powell developed a strategic and broad agenda through a process similar to the EC's process. In particular, he commissioned the creation of an interdisciplinary task force that drew upon a number of talented public servants at the FCC to think through and broadly reevaluate the goals of spectrum policy. The Spectrum Policy Task Force report that emerged from that process highlighted a number of important issues for the agency to evaluate and sought to set a proactive agenda for the agency.[87] 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.[88] To underscore the point,

82. *Id*. at 4.
83. *Id*. at 15.
84. *Id*. at 10–12.
85. *Cf. id.* at 4 (discussing the convergence of various technologies and the need for the FCC to respond through its regulations).
86. *See generally id.* at 6–9 (discussing goals and proposed changes at the FCC).
87. *See* SPECTRUM POLICY TASK FORCE, FED. COMMC'NS COMM'N, REPORT (2002), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf.
88. Compare, for example, the information related to the relevant goals of the agency with respect to spectrum and other issues. *Compare* Fed. Commc'ns Comm'n, Strategic Goals for Proceedings and Initiatives, http://wireless.fcc.gov/spectrum/proceeding.htm (last visited July 25, 2009), *with* Fed. Commc'ns Comm'n, Strategic Goals for Competition, http://www.fcc.gov/competition (last visited July 25, 2009), *and* Fed. Commc'ns Comm'n,

the only other one of the six priorities noted above where the agency displayed a hint of broad strategic thinking was public safety and homeland security. As to that issue, the agency adopted a two-page action plan to govern its efforts in 2003.[89]

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.[90] 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.[91] 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."[92]

Strategic Goals for Broadband, http://www.fcc.gov/broadband/ (last visited July 25, 2009), *and* Fed. Commc'ns Comm'n, Strategic Goals for Media, http://www.fcc.gov/mediagoals/ (last visited July 25, 2009).

89. *See* FED. COMMC'NS COMM'N, FCC HOMELAND SECURITY ACTION PLAN (2003), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-236428A2.pdf (announcing dual objectives to promote homeland security including strengthening protection of the communications infrastructure and promoting effective communication during emergencies).

90. *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, 22 F.C.C.R. 8938, 8938 (2007); *id.* at 8940 (Copps, Comm'r, concurring).

91. To be sure, strategic planning should not involve a mechanistic or formalistic commitment to addressing particular issues at predetermined times, but it should provide for a self-conscious commitment to publicly identified priorities. As the Chairman of the U.K. Competition Commission explained, strategic planning "'cannot be too rigid and it cannot be too binding. [B]ut everything we do should take place . . . against a background of priorities and policy consciousness.'" WILLIAM E. KOVACIC, CHAIRMAN, FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY, at xii (2009), www.ftc.gov/os/2009/01/ftc100rpt.pdf (footnote omitted).

92. IP Democracy, http://www.ipdemocracy.com/archives/002640the_fcc_is_the_worst_communicator_in_washington.php (Sept. 5, 2007, 9:17 EST); *see also* John Dunbar, *FCC Shrouds Rulemaking in Secrecy*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 5, 2007, at 3A ("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."); Capital Ideas, http://www.multichannel.com/blog/Capital_Ideas/7925-Federal_Incommunicado_Commission.php (Aug. 8, 2007) (discussing the evasive attitude used by the FCC commissioners when dealing with members of the press).

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."[93] 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. This section discusses how and why the FCC needs to reform each of these shortcomings.

In terms of managing its rulemakings, the FCC has gotten into the habit of commencing wide-open proceedings that do not propose specific rules. Consequently, the FCC generally leaves parties with the challenge of either 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 (APA), which specifies only that NPRMs must include "a description of the subjects and issues involved."[94] 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.[95] The basic idea behind the proceeding—to develop more information related to how radio stations operate—was a noble one (discussed in Part III below), but the way it was conducted deprived the public and affected parties of key information that

93. Video: Digital Broadband Migration Conference: Rewriting the Telecom Act (University of Colorado Law School 2005), http://itp.colorado.edu/itp-content/sftp-conference-videos (scroll to "The Digital Broadband Migration: Rewriting the Telecom Act," then follow "Part 6" hyperlink) (last visited Oct. 31, 2009).

94. 5 U.S.C. § 553(b)(3) (2006). The D.C. Circuit has specified that the relevant concern is that "if 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).

95. *See generally* Broadcast Localism, 23 F.C.C.R. 1324 (2008).

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.[96] 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."[97] 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;[98] 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."[99]

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 a NPRM with a limited disclosure of the issues that ultimately emerge as important, it should issue a Further NPRM, as the agency recently did in the so-called D Block proceeding, which was designed to facilitate the emergence of a private–public partnership for public-safety communications.[100]

As for the ex parte process, the agency's commitment to greater transparency as to what issues are up for discussion at the commencement

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96. Amy Schatz, *Industry Seethes as FCC's Martin Sets New Curbs*, WALL ST. J., Dec. 18, 2007, at A1.

97. Puzzanghera, *supra* note 12.

98. At the National Telecommunications and Information Administration (NTIA), for example, notices of proposed rulemakings often are both shorter in terms of the relevant background and focus commentators 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).

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

100. *See* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, 23 F.C.C.R. 14,301, 14,452 (2008).

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 value of 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.[101] 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 objections in order to pursue them on appeal. Unfortunately, the FCC's culture of secrecy around what items are up for discussion at particular points in time has contributed to an environment that, as the Government Accountability Office (GAO) put it, enables "stakeholders with advance information about which rules are scheduled for a vote [to know] when it may be most effective to present their arguments to FCC, while stakeholders without access to this information may not."[102]

The current system of ex parte filings that are devoid of content not only undermines informed deliberation of the relevant issues but also precludes the opportunity for meaningful judicial review.[103] 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.[104]

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101. Letter from Laura Carter, Vice President for Fed. Gov't Affairs, Alltel Corp., to Marlene Dortch, Sec'y, Fed. Commc'ns Comm'n (Apr. 30, 2008), http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520006854.

102. U.S. GOV'T ACCOUNTABILITY OFFICE, FCC SHOULD TAKE STEPS TO ENSURE EQUAL ACCESS TO RULEMAKING INFORMATION 4 (2007), http://www.gao.gov/new.items/d071046.pdf. In response to the Government Accountability Office's stinging report—which criticized the FCC's ex parte process on the ground that well-connected lobbyists can gain crucial information and insights about its processes not available to others—the FCC committed to post on its website all items that are circulating for a decision.

103. 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, 256–57 (D.C. Cir. 2008).

104. Another obvious option—for the agency to police abuses in the ex parte process

The abuse of the ex parte process is exacerbated by two features of FCC proceedings that are under the agency's control: the length of its proceedings and 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.[105] 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.[106] Second, if 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. 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 that are actually voted on do not reflect "well-reasoned statements of principle" but rather are a "patchwork of pieces" that must be stitched together after the

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itself—is one that the FCC has shown itself unwilling or incapable of pursuing. *See* Spectrum Talk, http://spectrumtalk.blogspot.com/2008/09/marcus-spectrum-solutions-files.html (Sept. 11, 2008, 11:57 EST) (presenting a filing with the FCC that took issue with the agency's consistent inability to enforce its ex parte rules over the past few years).

105. Ted Hearn, *The Winds of Change*, MULTICHANNEL NEWS, Jan. 26, 2008, http://www.multichannel.com/article/CA6525874.html. 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).

106. 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* Hearn, *supra* note 105 (noting pendency of petition to deny must-carry rights to TV stations that primarily air home-shopping programming).

decision is announced, often requiring substantive redrafting.[107]

III. TOWARD PRINCIPLED AND COLLEGIAL DECISIONMAKING

A critical challenge facing the FCC is how to more carefully evaluate 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. To highlight the failings in each context and the need for a more well-thought-out strategy of how they should each be used, this Article discusses one example of each and presents 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 process 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, "The 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."[108] Indeed, the appeal of using a procedure that can lead to cooking the books, as Commissioner Adelstein noted as to one rulemaking,[109] 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

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

108. Schurz Commc'ns, Inc. v. FCC, 982 F.2d 1043, 1048 (7th Cir. 1992) (citation omitted).

109. Commissioner McDowell apparently seconded that judgment in a private e-mail to his staff. *See* DECEPTION AND DISTRUST, *supra* note 6, at 14 (quoting McDowell as stating, "The books have been cooked to trigger the 70/70 rule.").

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[110] after a rushed comment period process and on the basis of an ex parte proposal that was subject to no public comment and no agency deliberation.

In dissenting from the E-911 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."[111] In particular, Commissioner Adelstein added that

> [g]iven 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.[112]

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.[113] Ultimately, the Public Safety and Homeland Security Bureau acknowledged that the Order was overly aggressive and imposed a stay,[114] 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."[115]

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 deliberation—to be successful public policymaking tools. Notably, rulemakings need not

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110. *See* Wireless E911 Location Accuracy Requirements, 22 F.C.C.R. 20,105, 20,108 (2007).

111. *Id*. at 20,136 (Adelstein, Comm'r, approving in part, dissenting in part).

112. *Id*. at 20,137.

113. *See* Wireless E911 Location Accuracy Requirements, 22 F.C.C.R. 10,609, 10,636–37 (2007) (Adelstein, Comm'r, concurring).

114. Wireless E911 Location Accuracy Requirements, 23 F.C.C.R. 4011, 4012 (2008).

115. Press Release, Fed. Commc'ns Comm'n, Commissioner Jonathan S. Adelstein Responds to Public Safety Bureau Stay Order (Mar. 12, 2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280787A1.pdf.

be viewed as a binary alternative 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.[116]

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 fails to provide 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.[117] 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.[118]

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 handle adjudicative proceedings. Indeed, when an ALJ is given an assignment—as occurred recently with a case involving a dispute between the NFL Network and Comcast—the FCC often maintains a high level of involvement and micromanagement of the proceeding, thereby undermining the ALJ's authority.[119] 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

116. For a comprehensive assessment of the rulemaking process at administrative agencies (with a focus on the FAA), see U.S. GOV'T ACCOUNTABILITY OFFICE, AVIATION RULEMAKING: FURTHER REFORM IS NEEDED TO ADDRESS LONG-STANDING PROBLEMS (2001), http://www.gao.gov/new.items/d01821.pdf.

117. *See generally* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13,028 (2008).

118. *Id*. at 13,088 (McDowell, Comm'r, dissenting) ("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.").

119. In that proceeding, the FCC backed off its effort to dictate matters after Chairman Martin left the agency, reassigning the proceeding to the administrative law judge (ALJ) and authorizing it to go forward. *See* John Eggerton, *Cablers Win Respite on Network Access Claims*, MULTICHANNEL NEWS, Jan. 27, 2009, http://www.multichannel.com/article/162848-Cablers_Win_Respite_On_Network_Access_Claims.php?rssid=20059.

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.[120]

Going forward, the FCC has an important opportunity to invigorate its enforcement program and use it in a more strategic matter. In particular, the FCC needs to develop the capability to enforce 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.[121] To be sure, the FCC has experimented with the model of allowing greater front-end flexibility in return for after-the-fact oversight,[122] but this approach is the exception.

To appreciate the limited development of the FCC's enforcement processes, consider the long-standing 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 . . . for more than five years."[123] 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, Sirius agreed to a "voluntary contribution" of $2,200,000 and XM agreed to one of $17,394,375.[124]

The FCC's failure to treat seriously the long-standing complaints about

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120. GOV'T ACCOUNTABILITY OFFICE, 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.

121. 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 21, at 26–28.

122. *See* Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems (*BPL Order*), 19 F.C.C.R. 21,265 (2004) (adopting new regulations to promote the "rapid introduction and development" of broadband systems).

123. Sirius Satellite Radio Inc., 23 F.C.C.R. 12,301, 12,324 (2008) (statement of Comm'r Tate).

124. *Id.* (describing the consent decree the FCC entered into with Sirius); XM Radio, Inc., 23 F.C.C.R. 12,325, 12,347 (2008) (statement of Comm'r Tate) (describing the consent decree the FCC entered into with XM).

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.[125] 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 negotiation)[126] or lead to an adjudicated decision. In practice, however, the FCC almost never uses its ALJs and, according to the FCC website, FCC ALJs have decided only three matters since 2005.[127]

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.[128] Indeed, in some states, the "ALJs are more independent than state appellate or trial court judges."[129] In using ALJs, state commissions (and some federal ones, like the Federal Energy 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 of 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

125. *See, e.g.*, Unlicensed Operation in the TV Broadcast Bands, 23 F.C.C.R. 16,807, 16,808 (2008) (adopting new rules legalizing the unlicensed use of TV spectrum locations that are unused by licensed services); *see also* Posting of Harold Feld to Wetmachine, http://www.wetmachine.com/totsf/item/1256 (July 16, 2008, 18:53 EST) (complaining that the FCC should not "reward" users of illegal wireless microphones by offering them priority over authorized users).

126. 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 6, at 18–19, 23–24.

127. *See* Fed. Commc'ns Comm'n, Office of Administrative Law Judges, http://www.fcc.gov/oalj/ (last visited July 19, 2009).

128. 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 regulatory commissions, unlike the FCC, use ALJs regularly and arguing that the FCC should begin using them effectively).

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

Commissioner McDowell: "The truth is, the FCC does not know what Comcast did or did not do."[130] 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 administrative 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.[131] 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.[132] Nonetheless, even assuming that the FTC improves its administrative-litigation process, some have leveled the more fundamental criticism of this model of decisionmaking that it often leads to the preordained results sought by the FTC.[133] 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.

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130. Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13,028, 13,092 (2008) (McDowell, Comm'r, dissenting). As Commissioner 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. (footnote omitted).

131. For a discussion of FTC's use of administrative litigation, see KOVACIC, *supra* note 91, at 42–45.

132. *See* Prepared Statement of the Fed. Trade Comm'n Before the House Comm. on Commerce, Sci., and Transp. 15–16 (Apr. 8, 2008), http://www.ftc.gov/os/testimony/P034101reauth.pdf.

133. *See* A. Douglas Melamed, *The Wisdom of Using the "Unfair Method of Competition" Prong of Section 5*, GCP, NOV. 2008, at 12–24, http://www.wilmerhale.com/files/Publication/704e2922-6df7-4bb7-bd88-014695e523b1/Presentation/PublicationAttachment/f5c9a3c8-3a90-4b16-900b-2a54a5ba420a/Melamed_Nov_08_1.pdf (arguing that agency members cannot be neutral and independent adjudicators because they unavoidably act to advance the interests of the agency and providing statistical evidence showing that the FTC consistently rules against respondents).

C. Merger Reviews

The third principal type of policymaking vehicle used by the FCC is merger-review proceedings. Technically speaking, these proceedings are adjudications, but practically speaking, they are often negotiations where the FCC seeks to leverage its authority to approve the merger to obtain concessions that often have little or nothing to do with the competitive issues raised by the transaction.[134] 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."[135] 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."[136] 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.[137] In that case, the FCC evaluated whether it should impose an interoperability mandate on AOL's instant messaging service. 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."[138] 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

134. 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, 876.

135. Applications of Ameritech Corp., Transferor, and SBC Commc'ns Inc., Transferee for Consent to Transfer Control of Corporations Holding Commission Licensees and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules (*Ameritech Order*), 14 F.C.C.R. 14,712, 15,197 (1999) (Powell, Comm'r, concurring in part and dissenting in part).

136. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 2 (2004), http://www.usdoj.gov/atr/public/guidelines/205108.pdf.

137. *See* 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, 16 F.C.C.R. 6,547 (2001).

138. *Id.* at 6,610.

comment by a wide range of interested parties."[139] 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.[140] The passage of two years revealed as much and the FCC decided to remove the condition.[141]

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 (AT&T and Verizon) to impose such a requirement on them alone.[142] Similarly, with respect to network neutrality, the FCC had originally suggested that its Internet policy statement was nonbinding;[143] 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 those principles.[144] 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."[145]

The final flaw that is often inherent in the FCC's merger-review process

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139. *Id.* at 6,713 (Powell, Comm'r, concurring in part and dissenting in part).

140. *See* Philip J. Weiser, *Internet Governance, Standard Setting, and Self-Regulation*, 28 N. KY. L. REV. 822, 842 (2001) (critically evaluating the FCC's decision in the AOL–Time Warner merger case).

141. *See* 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, 18 F.C.C.R. 16,835 (2003).

142. *See* SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control (*AT&T Order*), 20 F.C.C.R. 18,290, 18,392 (2005); Verizon Commc'ns Inc. and MCI, Inc. Applications for Approval of Transfer of Control (*Verizon Order*), 20 F.C.C.R. 18,433, 18,537 (2005).

143. *See* Press Release, Fed. Commc'ns Comm'n, Chairman Kevin J. Martin Comments on Commission Policy Statement (Aug. 5, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A2.pdf ("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.").

144. *See AT&T Order*, 20 F.C.C.R. at 18,350–51; *Verizon Order*, 20 F.C.C.R. at 18,509.

145. *Verizon Order*, 20 F.C.C.R. at 18,573 (Abernathy, Comm'r, statement).

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.[146] 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 noncommercial channels.[147] Despite the request of some parties that the agency adopt a specific enforcement mechanism to ensure that such requirements are followed,[148] the FCC declined to do so, suggesting that, once again, the past may well be prologue in terms of enforcing merger conditions.

Contrary to the claims of some critics, the FCC's merger-review processes are not hopelessly dysfunctional and irremediable. To be sure, this view is plausible and pressed by former Commissioner Harold Furchtgott-Roth, among others.[149] This position, however, overlooks that there are successful cases of FCC merger review and that the agency's oversight of mergers can be a productive part of the policymaking process.[150] Consider, for example, the FCC's review of the News Corp.–

146. *Ameritech Order*, 14 F.C.C.R 14,712, 14,877 (1999).

147. *See* Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., to Sirius Satellite Radio Inc., Transferee, 23 F.C.C.R. 12,348, 12,359 (2008) (listing the FCC's requirements in permitting the merger).

148. *See* Letter from Gigi B. Sohn, President, Public Knowledge, and Andrew J. Schwartzman, President & CEO, Media Access Project, to Kevin Martin, Chairman, Fed. Commc'ns Comm'n (July 10, 2008), http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520033905 (arguing that the lengthy petition process and waiting for licenses to come up for renewal are not sufficient enforcement mechanisms and that the FCC should have an independent oversight position to enforce merger terms); Letter from Paul P. Desai and Andrew J. Schwartzman, Media Access Project, to Marlene Dortch, Sec'y, Fed. Commc'ns Comm'n (July 9, 2007), http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519541586 (arguing that, if approved at all, the proposed merger between Sirius and XM should be conditioned on the following requirements: (1) "A set aside for non-commercial, educational programming," (2) "Leased access of channels," (3) "[A] portion of the allocated spectrum returned for auction," and (4) "[C]arry[ing] local non-commercial, educational channels").

149. Harold W. Furchtgott-Roth, Testimony Before the Antitrust Modernization Comm'n 5–7 (Dec. 5, 2005), http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Furchtgott_Roth_statement.pdf.

150. For a discussion of merger remedies and the appropriate role of regulatory authorities in them, see generally Philip J. Weiser, *Reexamining the Legacy of Dual*

DIRECTV merger. In that case, the agency stuck to devising competition policy remedies that were necessitated by the merger.[151] Notably, the Justice Department concluded in that case that the FCC's 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.[152] In imposing a set of conditions as part of clearing the merger, the FCC did not adopt a stand-alone regime that it would be unlikely to enforce but rather imposed a set of requirements that were harmonized with its existing regulatory requirements.[153] 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.[154]

IV. TOWARD DATA-DRIVEN DECISIONMAKING

The FCC has yet to develop a model of generating information and insights that can inform its policymaking agenda. This part outlines how the agency could seek to obtain better information, elicit more-effective public input, and, finally, enable 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 rarely commissions, supports, or uses truly independent research in its policymaking activities. 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

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Regulation: Reforming Dual Merger Review by the DOJ and the FCC, 61 FED. COMM. L. J. 167 (2008).

151. *See* Gen. Motors Corp. & Hughes Elec. Corp. (*News Corp. Order*), 19 F.C.C.R. 473, 552–55 (2004).

152. Press Release, U.S. Dep't of Justice, Justice Department Will Not Challenge News Corp.'s Acquisition of Hughes Electronics Corp. (Dec. 19, 2003), http://www.usdoj.gov/opa/pr/2003/December/03_at_714.htm.

153. *See News Corp. Order*, 19 F.C.C.R. at 531–34.

154. *Id*. at 553–55.

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 reestablish the tradition of an empowered Chief Economist and Chief Technologist, both of whom should play essential parts in 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, employees often were afraid that those who "express an opinion, even if based on fact" might well be "demoted, reassigned, or hounded out of the agency" if the opinions articulated differed from a preset agenda.[155]

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 outside of the agency. First, consider the *Computer I* decision,[156] 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,[157] 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,[158] 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 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 was not before the Commission in the particular proceeding.[159] Finally, the FCC engaged in ongoing

155. DECEPTION AND DISTRUST, *supra* note 6, at 21.

156. Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities (*Computer I*), 28 F.C.C.2d 267 (1971).

157. 47 C.F.R. §§ 68.1, 68.2 (2008).

158. Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420 (1968).

159. 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. *See generally* Thomas W. Hazlett, *A Rejoinder to Weiser and Hatfield on Spectrum Rights*, 15 GEO. MASON L. REV. 1031, 1038 (2008) (noting that deregulation of the use of unlicensed bands for radio transmitters paved the way for the use of spread spectrum devices, including Wi-Fi routers and cordless phones).

reassessment of the effects of the decision, ultimately revising it as the agency evaluated the relevant economic issues and technological changes.[160]

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 *Access Broadband over Power Line* (*BPL*) decision.[161] 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 decisionmaking 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 U.S. Court of Appeals for 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.[162] 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"[163] 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."[164]

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.[165] When the agency adopted its rules, it failed to provide parties with a sufficient opportunity to scrutinize and

160. *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) (highlighting the various actions taken in the Computer Inquiries and describing the changes made in the subsequent *Computer II* and *Computer III* decisions).

161. *BPL Order*, 19 F.C.C.R. 21,265, 21,300 (2004).

162. Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotation marks and citation omitted).

163. *Id.* at 237.

164. *Id.* at 239.

165. *See* 2002 Biennial Regulatory Review, 18 F.C.C.R. 13,620, 13,887–901 (2003).

provide feedback about the scope and nature of the Diversity Index. Consequently, the U.S. Court of Appeals for the Third Circuit reversed the FCC in *Prometheus Radio Project v. FCC*,[166] highlighting that

> [a]s 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.[167]

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 failed 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.[168]

In light of the judicial responses to failed FCC processes in the BPL and media-ownership cases discussed above, some might argue that the necessary incentives for institutional reform are present and, in any event, the Judiciary is capable of compensating for the FCC's institutional failings. This view, however, overstates greatly the impact of judicial review. Notably, many rulemakings vulnerable to the concerns highlighted above—such as an overreliance on the ex parte process—do not necessarily raise a ground for reversal.[169] More fundamentally, many of the institutional failings discussed above often lead to agency inaction that, even when subject to correction through the extraordinary remedy of a writ of mandamus, can only be addressed many years—even a decade—after

166. 373 F.3d 372, 435 (3d Cir. 2004) (remanding so that the FCC may justify or modify its method for setting numerical limits).

167. *Id.* at 412.

168. Mark Cooper, Junk Science and Administrative Abuse in the Effort of the FCC to Eliminate Limits on Media Concentration 5–6 (May 21, 2008) (unpublished paper, presented at the 2008 annual meeting of the International Communication Association), http://www.allacademic.com//meta/p_mla_apa_research_citation/2/3/3/1/1/pages233118/p233118-1.php.

169. Consider, for example, that the D.C. Circuit has concluded that reliance on ex parte contacts is "impolitic" but not grounds for reversal. *See* Action for Children's Television v. FCC, 564 F.2d 458, 473 (D.C. Cir. 1977).

the fact.[170] Consequently, the impetus for institutional reform will need to come either from the agency itself or Congress.

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

Over the last several years, the FCC has generally 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 reengage other governmental agencies, nonprofit organizations, and academic institutions. With respect to other governmental agencies, there are a number of notable agencies with scientific and technical capabilities with whom the FCC could and should seek more frequent cooperation, including the Commerce Department laboratories and the standard-setting expertise at National Institute of Standards and Technology. On the state and local front, the FCC's abandonment of the State and Local Government Advisory Committee and its lack of relationship with state chief information officers both greatly hamper its effectiveness in areas ranging from broadband policy to public-safety communications. As for nonprofit and academic organizations, the agency can enlist them as partners in elevating the level of analysis of critical communications policy issues by reaching out to them, taking their research more seriously, and seeking to generate data that can enable independent research.

In terms of the private sector, the FCC has a number of opportunities to enlist valuable expertise. For starters, the agency should once again activate the Technical Advisory Committee that, when active, was a valuable sounding board on both broad strategic issues and specific tactical ones.[171] As Russell J. Lefevre, president of IEEE-USA, put it, "Despite 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."[172]

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170. *See, e.g.*, *In re* Core Commc'ns, Inc., 531 F.3d 849, 861–62 (D.C. Cir. 2008) (granting a writ of mandamus and ordering the FCC to respond to a 2002 remand by 2008).

171. For a broad discussion about how such bodies are and can best be used, see BRUCE L.R. SMITH, THE ADVISERS: SCIENTISTS IN THE POLICY PROCESS (1992).

172. Letter from Russell J. Lefevre, President, IEEE-USA, to Kevin J. Martin, Chairman, Fed. Commc'ns Comm'n (June 5, 2008), http://www.ieeeusa.org/policy/policy/2008/060508.pdf.

C. Collecting and Sharing Data with the Public

To facilitate data-driven decisionmaking, the FCC must develop a more coherent and comprehensive commitment to collecting relevant data. The agency currently lacks, for example, the most basic data about how the wireless spectrum is being used and where broadband services are available. Moreover, the agency has failed to make available 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 businesses paid for high-capacity lines (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."[173] In short, the FCC has not developed an effective strategy for either collecting data or distributing it.[174]

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 had broadband service) and leaving that system unchanged for a decade.[175] In the absence of FCC leadership on this front, 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.[176] Just recently, Congress unanimously passed the Broadband

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173. GOV'T ACCOUNTABILITY OFFICE, FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES 15 (2006), http://www.gao.gov/new.items/d0780.pdf.

174. *See generally* Philip M. Napoli & Joe Karaganis, *Toward a Federal Data Agenda for Communications Policymaking*, 16 COMMLAW CONSPECTUS 53 (2007) (outlining the problems associated with communications policymaking due to the deficiencies in availability and accessibility of data sources); David Robinson et al., *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160 (2009) (proposing that the government redesign the means in which it provides information to the public by creating a publicly accessible infrastructure).

175. In 2008, the FCC finally revised its decade-long measurement procedure, but that revised model will not go into effect until 2009. *See* 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) Subscribership, 23 F.C.C.R. 9691 (2008), *reconsidered*, 23 F.C.C.R. 9800 (2008).

176. *See* PHILIP J. WEISER, A FRAMEWORK FOR A NATIONAL BROADBAND POLICY 14–15 (2008) (discussing "ConnectKentucky" and California initiatives), http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/A_Framework_for_a_National_Broadband_Policy_0.pdf.

Data Improvement Act, requiring the FCC to take such a leadership role in this area.[177]

In addition to evaluating the extent of broadband deployment, the FCC could also help to more clearly define the level of broadband service and educate consumers in broadband markets as to what they should expect from their provider.[178] Today, for example, no effective disclosure regime exists to make clear what "up to 1 megabit per second" really means.[179] 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.[180]

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.[181] In short, this Order moved the FCC 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.[182]

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

178. For a discussion as to how such an effort could operate, see Phillip J. Weiser, *The Next Frontier for Network Neutrality*, 60 ADMIN. L. REV. 273 (2008).

179. *See id.* at 291–92.

180. 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 (2006) (footnote omitted); *see also* Archon Fung et al., The Political Economy of Transparency: What Makes Disclosure Policies Effective? 16–17 (Dec. 2004), http://www.hks.harvard.edu/taubmancenter/transparency/downloads/effectiveness.pdf (noting competition based on nutritional information after government regulation set forth framework for disclosure).

181. Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering, 23 F.C.C.R. 13,647 (2008).

182. The lack of effective information collection by the FCC "create[s] '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

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 whom 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.[183] 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.[184] 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.[185] 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 Los Angeles communities at risk of fire violations to using technologies like Google Maps to make interesting connections.[186]

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

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engage in data-driven decisionmaking. Philip M. Napoli, Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation 4–5 (2008) (McGannon Center Working Paper), http://fordham.bepress.com/cgi/viewcontent.cgi?article=1000&context=mcgannon_working_papers.

183. 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, 18 F.C.C.R. 20,604, 20,692 (2003).

184. *See* Robinson, *supra* note 174, at 160–61 (arguing that private actors are better suited to provide information to citizens and should be allowed to create and alter the ways individuals have access to public data).

185. *See generally* DON TAPSCOTT & ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING (2006) (highlighting various examples of mass and global internet collaboration).

186. *See* L. Gordon Crovitz, Op-Ed., *From Wikinomics to Government 2.0*, WALL ST. J., May 12, 2008, at A13 (describing the growth of user-generated content as it expands to various public citizen-driven endeavors).

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 ways of getting feedback that is most conducive to shaping regulatory policy. Consider, for example, the difference between a short e-mail expressing an opposition to media consolidation as opposed to a more developed reaction to a specific proposal. To be sure, a large number of e-mails expressing a basic level of opposition to a particular course of action provides a very valuable signal. To help justify its action, however, the agency must develop well-reasoned arguments, which can be aided by well-informed civic participation that comes from the deliberation on issues akin to that produced by the jury system.[187]

V. TOWARD A NEW PROJECT FOR ADMINISTRATIVE LAW

The failings of the FCC are not unique among administrative agencies. Administrative law scholars, however, have rarely evaluated the nuts and bolts of how administrative agencies themselves operate, preferring to address the substantive legal questions they address or the legal issues involved in reviewing agency decisionmaking. Thus, for every one hundred articles addressing one aspect or another of the *Chevron* doctrine, there is perhaps one article—if that many—evaluating how administrative agencies or a particular agency operates in practice.

The challenge for administrative law scholars is thus to reinvent the field and set new priorities as to what type of scholarship can best promote effective administrative decisionmaking. As discussed in this Article, there is an entire aspect of the administrative state—how administrative agencies operate in practice—that remains relatively unexplored. Going forward, scholars can profitably engage in the important project of investigating this question, comparing the strategies and practices of different agencies (both domestic and foreign ones) and developing a better understanding of both how agencies can and should operate.

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187. *See* Nou, *supra* note 99, at 617–24; *id.* at 621–22 ("[C]itizen 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."). For suggestions on how to enable more effective deliberation using new technologies, see Peter M. Shane, *Deliberative America*, 1 J. PUBLIC DELIBERATION Article 10 (2005) (reviewing BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY (2004) and ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT (2004)).

The FCC provides an illuminating case study, but a number of other agencies are also ripe for examination. The Securities and Exchange Commission, for example, appears to have made policy decisions premised on the promise of effective monitoring that never took place.[188] In one view, this can be viewed as simply a bad policy decision. Another perspective, however, is to evaluate why the promised monitoring did not take place, whether monitoring behavior after the fact is something the agency is able to perform in other contexts, and, if not, what reforms might enable the agency to perform such monitoring. Stated differently, administrative and regulatory law scholarship generally takes the institutional processes used by agencies as a given and evaluates whether the substantive policy decisions or administrative procedures are within that constraint. As explained in this Article, an agency's institutional process is not a black box; rather, it is shaped by a series of practices that can be examined, evaluated, and potentially changed.

Moving from institutional practices to institutional structure, the future of administrative law scholarship will need to take seriously questions about whether and when the right strategy is to abolish an agency rather than to reform it. In the case of the FCC, Lawrence Lessig's call for abolition is premised on the theory that "[y]ou can't fix DNA."[189] That theory, however, is not necessarily the case. As demonstrated by the shock to the FTC's system in the 1980s, agencies can radically transform their institutional practices and performance. Moreover, any analysis of whether to abolish an agency must also grapple with the concomitant challenge of building a new institutional culture—a challenge that Lessig plainly ignores.

Finally, addressing questions of institutional mission and culture must also grapple with the sometimes awkward juxtapositions of responsibilities lodged in administrative agencies. The framers of the New Deal Constitution—those legislators who embraced the notion that agencies could act effectively as a quasi-executive, quasi-legislative, and quasi-judicial body—acted on questionable assumptions about how administrative agencies would operate in practice. In particular, they failed to appreciate that the ability to use these different tools sometimes leaves agencies at a loss of how to proceed and without a fully developed sense of

188. *See* Stephen Labaton, *Agency's '04 Rule Let Banks Pile Up New Debt, and Risk*, N.Y. TIMES, Oct. 3, 2008, at A1 (explaining how the SEC's supervisory program, led by the former SEC Chairman Christopher Cox, was deemed a "low priority").

189. *See* Lessig, *supra* note 7. This view, which depicts agency culture as fixed, follows a long-standing and credible depiction of how agencies operate. For an earlier such portrait, see Feller, *supra* note 4, at 654 ("Existing agencies have congenital characteristics which the most heroic efforts cannot change.").

how any of the tools should work, and leads to a lack of focus and follow-through in using a particular tool. As former FCC Chairman Newton Minow put it with respect to the FCC's failings in this regard, the agency's institutional processes often left it in "a never-never land" that produced only "quasi-solutions."[190] Consequently, a major project for administrative law—albeit one that must be pursued by Congress and the agencies themselves—is when and how agencies should use a particular policymaking tool (e.g., rulemaking, adjudication, or self-regulation).[191]

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 reexamination of the agency's institutional processes with an eye toward 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. To do so, the FCC will need to follow the lead of the FTC, which impressively reexamined and rebuilt its institutional culture over the last twenty-five years, thereby enabling it to operate much more effectively and to win over its critics.

For administrative law scholars, examining the institutional processes of the FCC as well as other regulatory agencies that suffer similar defects represents a new brand of scholarship and raises a series of questions that are, in effect, the hidden side of the modern administrative state. As discussed in this Article, the design and functioning of regulatory agencies is not one that can be assumed away or viewed as a black box. Rather, such agencies face a series of choices about institutional processes that, while influenced by their structure and culture, can be changed. Thus, those processes—as well as the culture and structure of the agencies themselves—must be critically examined and debated by the academy and policymakers just like the substantive decisions that result from those processes.

190. Minow, *supra* note 1, at 146.

191. To be sure, Professor Magill has noted the importance of this largely unexamined issue. In so doing, however, she has taken the approach of traditional administrative law scholarship, viewing it from the perspective of the courts who review administrative regulation. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1415 (2004) (noting that judicial review of this choice is effectively nonexistent, as courts tolerate the decision to proceed by a particular strategy "for a good reason, a bad reason, or no detectable reason").