Putting the Public Back in Public Interest: Painless Reforms to Improve the FCC

A report by

Media Access Project, Common Cause, & Econometric Research and Analysis

December 2007

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EXECUTIVE SUMMARY

The Federal Communications Commission (FCC) regulates the most important activities in our country -- how we get the news we need to govern ourselves, how we talk to one another over the phone or over the Internet, and whether everyone in the nation has easy and affordable access to the tools necessary to survive and succeed in the 21st Century.

Recently, the FCC has come under increased scrutiny regarding the processes it uses to make the rules that govern the broadcasting industry. A Government Accountability Office (GAO) study showing the FCC leaks information to telecommunication industry lobbyists, complaints from Congress that the FCC does not give enough time for public comment on proposed rules, and public interest advocates outraged over routinely being given short notice about public hearings has created the need for FCC processes to be examined and to find ways to improve them.

"The public must have confidence that the FCC genuinely serves the needs of all the people of the United States, not just those rich enough to field a team to play the inside the Beltway game," said Harold Feld, Senior Vice President of the Media Access Project.

"A healthy democracy requires a healthy media, and the FCC's role is to ensure we have a healthy media that serves the public interest," said Common Cause President Bob Edgar, "It is important to regularly examine the processes that the FCC uses to make its decisions, which is the goal of this white paper."

"In many respects the FCC recapitulates the failure of the telecommunications market: a system in which incumbents with power arising from their great wealth determine outcomes without regard for the best interest of the majority of Americans. Just as only well-regulated markets can deliver genuine competition, only an FCC with transparent procedures in which incumbents do not routinely prevail can guarantee that the public's airwaves are utilized for the public interest rather than the enrichment of special interests," said Dr. Gregory Rose, President, Econometric Research and Analysis.

Common Cause, the Media Access Project and Econometric Research and Analysis offer a set of recommendations that Republicans and Democrats alike should support as simple, affordable ways to involve the public in the critical dialog over our media and digital future. These recommendations, if implemented, will boost public confidence in the FCC by making it more transparent and fair and will make it a more efficient and effective enforcement agency:

<u>Open Access for the Public, Not Just Industry Lobbyists</u>

- Publish meeting agendas enough in advance to give fair warning. This would level the playing

field for the public, which does not have lobbyists prowling the halls of the FCC to discover what items are likely to be considered by the Commissioners before public input to the process is closed.

- Publish a list of orders on circulation – items that are considered by commissioners without a need for discussion at an open or closed agenda meeting – and update the list on a regular, scheduled basis. This, too, would reduce the huge advantage that professional lobbyists have in tracking the day-to-day progress of FCC business.
- Make it standard policy to allow 90 days for public comment after publication in the Federal Register and note Federal Register publication in the FCC's daily digest.
- Hold more public forums outside D.C. and provide at least thirty days notice of any public forum. The FCC has a tendency to insularity. Moving out of D.C. will bring in fresh faces and fresh perspectives. But these must be meaningful opportunities for public participation and, perhaps more importantly, must be perceived as such.

Open Up and Improve FCC Data

- Establish advisory committees to get outside expertise on data collection, data processing, and data presentation, in order to examine the "meta-questions" about these issues. Bring together academics, advocates, industry reps and other stakeholders to think about this as a process issue rather than in the context of a particular adversarial proceeding. At the least, do some surveys to find out the most useful way to bundle up data the agency already collects and wants to make public.
- Create better indexing of the FCC's Electronic Comment Filing System (ECFS).

Attitude Adjustment/Make Better Use of Existing Authority and Resources

- Make better use of existing rules and resources. Nothing prevents the FCC from making voluntary surveys mandatory on pain of fine or license revocation for failure to comply. Nothing prevents the FCC from using procedures to protect confidentiality when someone with information fears industry reprisals. Nothing prevents the use of FCC enforcement data and data from other government agencies in making public policy. Like Dorothy's companions, all the FCC requires is a heart, a brain, and courage.
- FCC must do a better job enforcing its own rules in a fair and consistent manner. The common perception, based on experience, is that the FCC rarely enforces its public file requirements or responds to complaints from individuals or small businesses − especially when filed against large companies with regular business before the Commission.
- Attitude adjustment. While many FCC staff do their best to assist members of the public, too many seem to regard industry representatives as "clients" while regarding members of the public as "nuisances." This is often reflected in the analysis of comments − which show a heavy bias toward industry filings.

We hope this report and its recommendations, if adopted, will ensure that the FCC operates with processes that are in the public interest. We also urge the FCC to continue to examine itself and be open to outside criticism. The FCC exists to serve the interests of the citizens of this country, and it is in that spirit which we make these recommendations.

This report was written by Harold Feld, Senior Vice President, Media Access Project, Dr. Gregory Rose, President, Econometric Research and Analysis and Jon Bartholomew, Director of Media Reform, Common Cause. The report was edited by Edwin Davis, Director of Research, Common Cause.

MEDIA ACCESS PROJECT

Media Access Project (MAP) is a nearly thirty-five year old non-profit tax exempt public interest telecommunications law firm which promotes the public's First Amendment right to hear and be heard on the electronic media of today and tomorrow. More information is available at MAP's website: http://www.mediaaccess.org

COMMON CAUSE

Founded as a citizens' lobby in 1970, Common Cause is dedicated to reforming government and strengthening democracy. Common Cause works to strengthen public participation in politics and government, ensure that government serves the public interest, curb the excessive influence of money in politics, promote fair and honest elections and protect the civil rights and civil liberties of all Americans. www.commoncause.org

ECONOMETRIC RESEARCH AND ANALYSIS

Econometric Research and Analysis is a firm which provides economic consulting services primarily for public interest advocacy groups dealing with the Federal Communications Commission. Among recent projects in which Dr. Gregory Rose has been active have been analysis of the AWS-1 spectrum auction and advocacy of anonymous bidding rules for the upcoming 700 MHz spectrum auction. Dr. Rose has also submitted expert comments in such proceedings before the FCC as the DTV white space, the Adelphia-Comcast-Time Warner transaction, commercial cable leased access, the 70/70 rule test, and media ownership and consolidation.

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INTRODUCTION

For years, advocates and academics have complained that the Federal Communications Commission (FCC) operates too much as a closed box with processes that favor well-funded industry participants over average lobbyists or public advocates. For the most part, these complaints have fallen on deaf ears.

To the extent the public interest community could address the situation, it has done so by increasing the quantity and quality of research produced by public advocates and by using the Internet to bring millions of individual citizens into the regulatory process. While these represent positive changes, they did not entirely offset the advantages that the FCC conferred on industry lobbyists capable of leveraging both their superior resources and their superior contacts among FCC staff. Unfortunately, as a result of the political climate and the pressure of industry lobbyists, no one considered it feasible to address the problem at the root: by pressing for thorough structural changes in the FCC and its processes for collecting, analyzing and publishing the data on which its regulatory decisions rest.

> "On several occasions I have written the FCC. In each instance they have sent an obtuse answer or response to the filings of my concerns. The response is generally to let me know that they have received my communication. Rarely if ever do they address the concerns of citizens who hold the trust of the airwaves. Just like everything else under dominion of empire and privatization, the people are being ignored in lieu of corporate profits and interests."
>
> -- Terri Lloyd, Los Angeles, CA

Recently, three events have created the possibility of wholesale reform:

- First, the Democratic takeover of Congress awakened interest in effective oversight of the executive branch, including the FCC. The Government Accountability Office (GAO), an independent investigative arm of Congress, conducted an investigation and, in September 2007, released a report highly critical of the FCC's processes for developing rules and regulations. The GAO found that, as public advocates had alleged for years, the FCC's processes systemically advantaged members of industry over members of the public by providing industry lobbyists with greater access to information, access to staff, and forewarning about the ultimate outcome of the rulemaking process.

- Second, the controversy over the FCC's review of media ownership regulations focused public attention on the agency's research that raised concerns the FCC suppressed information favoring the public. Since 2002, the FCC has conducted a Congressionally mandated study of its existing ownership regulations to determine whether these rules "continue to serve the

public interest" with instructions to "repeal or modify" rules that no longer serve the public interest.[1]

At the confirmation hearing for the re-nomination of FCC Chairman Kevin Martin, Senator Barbara Boxer (D-CA) produced a report prepared by FCC research staff that demonstrated that allowing consolidation of local television stations reduced the amount of local news available. Senator Boxer asked Chairman Martin if the FCC had suppressed the report because the conclusion disagreed with the position taken by the agency – and industry – that further consolidation did not harm the production of local news or even actively promoted the production of local news. Chairman Martin replied that he had not been Chairman when the report was written and supposedly suppressed, and that he would launch an investigation. The resulting investigation by the Inspector General's office, as well as disclosure of other reports possibly suppressed or discontinued because they contradicted agency positions, sparked a general investigation into the agency's processes in the media ownership proceeding.

Coupled with the concerns about suppressing data, the recent push by Chairman Martin to enact final rules that would relax the prohibition on owning a television station and a daily newspaper in the same market (the "newspaper broadcast cross-ownership rule") raised concerns that the agency was in a "rush to judgment," had failed to address the oft-cited problem of encouraging minority ownership in any meaningful way, and had denied the public the chance to comment on an actual set of proposed rules. The latter raised particular concerns about due process, since commenting on possible changes in the abstract cannot have the same effectiveness as addressing actual proposed rules. While the legal standard under the Administrative Procedure Act (APA) for notice to the general public and an opportunity for comment is very broad, members of Congress and others complained that the FCC had violated the intent of the law by preventing the public from commenting on proposed final rules within a meaningful time frame.

Furthermore, there was a groundswell of protest at the extremely short notice given for public hearings in Washington, D.C. and Seattle, Washington. The FCC gave less than a week's notice in each case, aggravated by holding the Seattle hearing immediately after the D.C. hearing. The short notice severely limited opportunities for members of the public to participate, conferring an advantage to well funded industry representatives able to organize and transport their supporters on a moment's notice. The release by Chairman Martin a week after the Seattle hearing of proposed rule changes, coupled with an op-ed supporting the proposed changes in *The New York Times*, made it difficult to escape the impression that the final hearings were a pointless *pro forma* exercise rather than a meaningful opportunity for the public to influence FCC policy.

- Third, the cable industry found itself on the receiving end of these procedural issues. At its November meeting, the FCC considered whether data demonstrated that the level of cable penetration had reached a statutory threshold of 70%, triggering new regulatory authority for the FCC to promote diversity of programming. The Commission also considered two orders in which it proposed to change the existing rules governing how independent cable programmers file complaints against cable operators for anticompetitive behaviors and the rates which

independent programmers pay to buy their way onto cable systems. Cable lobbying efforts succeeded in garnering interest from Republican members of Congress and Republican FCC Commissioners in the procedural questions raised by public advocates and Democrats in opposing industry positions on broadcast ownership. Even supporters of the proposed findings and rules among public interest advocates and Democrats expressed concern that the agency was not unwilling, but actually unable, to answer the empirical question of the level of cable penetration.

The confluence of these three events has created a consensus that the FCC processes need significant change to increase transparency, increase fairness, increase accountability to the public, and thus improve the FCC's decision making processes overall.

This situation did not begin with the current FCC, and it would be unfair to pretend that the present dysfunction of the agency results from Chairman Martin's tenure. Problems with the agency, particularly the failure to provide meaningful opportunity for comment on specific proposed rules, "cherry picking" data to support predetermined political outcomes, refusal to examine evidence that contradicts agency determinations, strategic use of control of the meeting agenda, and strategic use of control of the flow of information, all extend back to a greater or lesser degree to when Congress first began to press for extensive deregulation in the mid-1990s and the enactment of the Telecommunications Act of 1996. Further, the close relationships between FCC career staff and industry, referred to in academic literature as "agency capture," is a constant problem for administrative agencies. In an effort to capitalize on this recognition that ***everyone*** – whether industry lobbyist or public interest advocate or ordinary citizen participating in an FCC proceeding for the first time – benefits from fair processes, Common Cause, the Media Access Project and Gregory Rose of Econometric Research and Analysis provide this blueprint for process reform at the FCC.

A BRIEF HISTORY

The FCC has attempted to generate its own data through research projects. Notably, some of these studies have used proprietary data which the FCC purchased (and which makes independent evaluation of the data virtually impossible). The FCC also does some independent research on "big think" issues through its OSPP policy paper series.[2] The FCC invites interested parties to attend public fora and tutorials on public policy issues and new technologies. Finally, FCC Commissioners and staff travel to industry conferences and academic fora.

Problems with Self-Generated Research

As the expert agency charged with monitoring and regulating the dynamic and complex field of media and telecommunications, one would expect the agency to conduct independent research and undertake self-directed study as a means of determining what actions would best serve the public interest. Self-generated and self-directed research, however, accounts for a vanishingly small amount of FCC data. Even here, problems exist. First, it has proven difficult for researchers to obtain the necessary data sets from the FCC to check the validity of the results – particularly where the FCC has used proprietary or industry sensitive data. This is a particular problem where the FCC uses such research to formulate public policy, since the Administrative Procedure Act (APA) and sound concerns regarding agency

transparency and accountability require that federal agencies issue rules or determinations on the basis of an open record accessible to the public and reviewable by the courts.[3]

Even where the FCC has commissioned internal studies, there has been a tendency to vet that research on political and ideological criteria and to refuse to release results which cast doubt on the agency's deregulatory policies. Former Media Bureau Chief Kenneth Ferree was explicit in rejecting the release of the Draft 2003 Radio Report, which found greater market concentration in radio after the 1996 Telecommunications Act, for political and ideological reasons:

In an electronic mail message, the then-chief [Kenneth Ferree] stated that he:

> [was] not inclined to release this one unless the story can be told in a much more positive way. This is not the time to be stirring the "radio consolidation" pot. ... [Given that the reports in the series had been issued at uneven intervals in the past] It would hardly seem odd if we did not release one this year ... particularly given that we just did a big radio order as part of the biennial ... All in all this is a really bad time to release something like this. If we can change the focus and make it more positive ... then perhaps we can do something like this again, but this will take more than just regurgitating last year's report with new numbers.[4]

In other words, Ferree advocated releasing a study only if it were reworked to say the opposite of what the evidence said, i.e., "change the focus and make it more positive."

This is by no means the only example of ideological factors leading to the FCC's rejection of its own research.

Similar concerns were raised in the context of broadcast ownership studies authorized by Kevin Martin after he became Chairman. A June 2006 memo from then-FCC Chief Economist Dr. Leslie Marx begins with the sentence: "This document is an attempt to share some thoughts and ideas I have about how the FCC can approach newspaper-broadcast cross-ownership restrictions."[5] Such an approach to the design of critical research raises obvious concerns as to whether the agency had pre-decided the outcome and merely wanted a fig-leaf of research to satisfy public scrutiny and the courts. As the FCC moved forward to conduct independent studies, public advocates opposed to further relaxation of the rules continued to protest the way in which the FCC designed studies, managed data, and permitted public scrutiny of its actions. When the FCC finally released the studies for public comment, opponents of relaxing the ownership rules submitted 1,300 pages of detailing flaws in the methodology and conclusions of the studies. They also questioned whether the FCC had complied with Federal Data Quality Act.

As a result of the opacity of the Commission's research processes, and questions raised about the neutrality of the agency, the effort by the FCC to conduct its own research has had the opposite effect of what the Agency intended. Rather than assuring the public that the FCC acted as an "expert agency" and neutral decision maker, the agency sowed suspicion about the validity of its research and the fairness of its processes. With more transparent research processes, and by involving the public at earlier stages in the research, the FCC could have generated useful research and avoided the accusation of "cooking the books."

Problems Collecting Information from Industry

The agency has the power to compel parties to produce data and answer surveys.[6] It also has the power to require licensees to make information generally available to the public – typically called a "public file" requirement.[7] This accounts for a vanishingly small amount of data. The FCC rarely compels the production of data on an industry-wide basis. The FCC requires a bare minimum in its mandatory reports and public files, and most of the data required are of little value to public advocates or to the FCC's general policy goals. The agency primarily uses its power to compel production of information in two situations: in emergency situations, such as for the coming transition to digital television In February 2009, and as part of its analysis for mergers. In these cases, however, the information is usually protected by protective orders, is not accessible to public advocates, and is not used in the formulation of general FCC policy.

Finally, it is worth noting that the FCC has acquired a reputation for treating its formal reporting requirements as a joke. It conducts no audits and, although it has authority to punish failure to comply with its reporting rules with heavy fines or even license revocation, the FCC rarely imposes any penalty at all. Worse, to the extent the FCC does impose penalties, it has a reputation for punishing small licensees while leaving large group owners alone.

For example, in 2003, the Government Accountability Office (GAO) issued two reports detailing extensive problems with the FCC's annual reports to Congress on the state of competition and prices in the cable industry.[8] The GAO found numerous problems with the FCC's failure to enforce reporting requirements, acceptance of industry data without verification, failure to conduct independent audits or inquiries into the veracity of industry provided data, and other problems with the FCC's analysis and survey methodology. As a result, the GAO warned that the unreliability of the FCC's data "may compromise the ability of Congress . . . and of the FCC to monitor and provide oversight of the cable industry."

The vast majority of FCC data, therefore, comes from voluntary solicitations. The FCC issues Notices of Inquiry (NOIs), Notices of Proposed Rulemaking (NPRMs), voluntary surveys, and other voluntary means. Interested parties can also submit information as Petitions for Rulemaking, Requests for Clarification, or other official pleadings. Interested parties can also invite FCC commissioners and staff for informal off-the-record discussions and education – provided that no specific open proceeding is discussed, thus triggering the Commission's disclosure rules. While responses to a formal FCC proceeding, such as rulemakings, become part of the public record and accessible to advocates, other forms of voluntary data collection do not.

The FCC makes no effort to read the available public data from other federal or state agencies. For example, no one at the FCC reads the Security and Exchanges Commission (SEC) filings of publicly traded media conglomerates. Not only would this provide a steady stream of consistent data over time, it would be an interesting check on veracity. The SEC has a reputation for enforcement and investor analysts scrutinize SEC filings carefully. For example, in July of 2006, the FCC relied on representations from the cable operator Comcast that the company would gain approximately 630,000 subscribers as a result of its acquisition of systems from the bankrupt Adelphia and accompanying

system swaps with Time Warner.[9] Yet Comcast reported to the SEC that it had gained ***1.7 million*** subscribers from the transaction.[10] This difference of over one million subscribers potentially made the difference between Comcast exceeding or not exceeding the FCC's cable ownership limit.[11] Yet the FCC has never asked Comcast to explain the apparent discrepancy between what it told the FCC to get its acquisitions approved and what it told the SEC after it closed the deal.

Finally, the FCC does no field work. The FCC would rather resolve disputes about objective facts based on adversarial filings than send a staffer to investigate. The FCC does not need to guess if a signal is receivable in a particular market or if low income neighborhoods in urban areas have access to broadband lines. It can actually go and see – but it doesn't.

Public Hearings Must Be Genuine Opportunities For Public Comment

A limited exception to the aversion to field work is the FCC's holding of public hearings outside Washington D.C. In 2003, the FCC proposed to substantially eliminate the existing broadcast media ownership rules. Despite repeated requests by the Democratic Commissioners, then-Chairman Michael Powell consistently refused to hold public hearings or delay a vote on the proposed rule changes to gather further public comment – despite broad-based protests against changes to the rules as the general public became aware of the FCC's proposal.[12] This refusal to provide greater opportunity for public comment and to look outside Washington, D.C. created considerable political backlash against Powell and his proposed rule changes.

As a result, since August 2003, the FCC has undertaken a number of public hearings on broadcast localism (whether television and radio licensees provide adequate service to their local communities) and on media consolidation. While this is definitely a positive development, much about the public hearing process can be improved. Often these hearings occur with little advance notice. Procedures for how the general public can gain access and a chance to speak change from meeting to meeting, often in ways that appear to favor representatives of the local broadcasting community over individual residents. Further, while these hearings have generated days worth of taped testimony and a voluminous written record, the FCC has yet to issue a single report based on these hearings since they began in August 2003.

"We drove nearly 2 hrs to Portland ME on 6/28/07 for the FCC Public Comment session on 'Localism' in media, the only one to be held in New England. We expected to state opinion on how we were being served by local media.

We signed in well before the 4:00PM start, shocked that we were #95 on the long list. The "hearing" had been stacked against us. For six hours we endured endless 2 minute commercials by paid commercial media reps and many needy groups eager to ensure continuing free air time for publicity and announcements. The harangue was only rarely punctuated by independent media and most rarely by "Public" folks like us.

We had to leave at 10:20PM as #68 spoke. (our dog was locked in the house all day) The public had been shut out from what was supposed to be our chance to comment. …The hearing was a travesty, cynically perpetrated by commercial media and unwitting supporters. Free speech was restricted to a select few.

There couldn't be a better example of our urgent need for a broad range of reliable, independent sources for local and global information. The FCC must take measures to guarantee that We The People are heard and heeded! "

--Seabury Lyon, Bethel, ME

As a result, the public has grown increasingly cynical about the impact of these public hearings on FCC decision making. Public hearings should serve the twin purposes of providing the agency with much needed local information and fostering confidence that the agency provides genuine opportunities for citizen participation. This requires sufficient notice about the meeting location and procedures for citizens to have adequate time to make arrangements and have a genuine chance at

speaking. The Agency must also give some indication in a reasonable time that participating in such hearings makes a difference. Without some evidence that attending a hearing matters, even citizens who care deeply will stay home rather than waste their time.

"Several members of the FCC came to my town a couple of years ago to hold public hearings about large monopolies wanting to own the public airwaves. People came for miles in this rural state, in a dangerous storm to have their say. It was supposed to end at 9:00. I finally left at 11:00 when people were still waiting to speak. There was not a single person in the room, save the FCC, who did not make a strong case against corporate consolidation. I have to wonder, at other hearings are people standing up, cheering for media consolidation? If not, then have we not spoken clearly? Don't they have the answer to the question to conglomerate ownership of our airwaves? The people have spoken and are speaking. The FCC is not listening."

--Deirdre Monahan, Rapid City, SD

The FCC Does Not Even "Know" What It Already Knows

The FCC makes no effort to consider its own enforcement data. The Enforcement Bureau may relentlessly fine a company or dominant companies in a sector for repeated rules violations, but this has no impact on the FCC's general policy in rulemaking. Perhaps more tellingly, repeated complaints by individual complainants are never aggregated to see if there is a pattern of abuse within an industry which would warrant a change in the rules. Because most complaints are resolved in closed proceedings not available to the public, or are settled at the Bureau level, members of the public cannot easily obtain or track complaint data to provide evidence of trends, industry abuses, or problems with the effectiveness of existing FCC rules.

In addition, this contributes to the unfortunate development of FCC "street law" and precedent by career staff without oversight by political appointees or the public. This process is often manipulated by skilled insiders to achieve results that run contrary to the explicit intent of the rules. For example, the now common practice of using "local marketing agreements" (LMAs) or "joint sales agreements" (JSAs) to permit relationships tantamount to ownership where the rules make a license transfer illegal began with unpublicized staff approvals of such agreements outside the notice of the public. By the time the abuses became obvious, these loopholes had become thoroughly embedded in agency precedent. Efforts to enact reforms at the Commission level met stiff resistance from industry stakeholders, who argued that these arrangements had become so widespread that changes could undermine the entire industry structure.

Finally, the FCC makes no effort as an institution to take cognizance of trade journals or academic research in any systemic fashion. Institutionally, the FCC will read submissions by advocates in relevant proceedings, but it does not generally monitor industry or academic literature in any systemic way. Certainly individual analysts and staff attend industry trade shows, academic conferences, and remain current in the research literature of their field. This creates the unfortunate paradox of an "expert agency" with well-educated and well-trained staff displaying an abysmal ignorance on basic market conditions and trends in academic research.

The Impact of These Process Problems on the Public

In relying on voluntary disclosures and adversarial proceedings, the FCC fails to take into account the differences in resources between public advocates and industry advocates. Public advocates cannot afford to conduct the industry studies or generate the mounds of evidence the FCC has increasingly come to require. Worse, the FCC ignores the fact that the information required by public advocates to prove a particular point often lies with those with an interest in concealing or distorting such

information. Finally, because the Federal Register, the official publication in which notices of federal proceedings appear, is not exactly the stuff of best-seller lists, many parties with useful information may never know about an important proceeding. Even experienced advocates may miss notice of a proceeding, or lack time to participate, and therefore fail to bring valuable information to the attention of the agency.

> "I feel the FCC is putting corporate interests above the interests of the American people. This affects me every day I watch the news or use the public airwaves in another manner. I don't know what it will take to switch this paradigm around, but it must be done and whatever it takes it can't be done soon enough."
>
> -- Anonymous, Rochelle, IL

From the perspective of the general public, the FCC deliberative process is a black box. Nevertheless, the disparity of resources between public advocates and industry incumbents makes a huge difference here as well. Increasingly, the FCC has designated proceedings as "permit but disclose." This means that you can have any kind of meeting you want or file any submission you want while the proceeding is open, provided you file the new comment or a summary of the meeting in the public record.[13] Once "sunshine" kicks in a week before the Commission's monthly meetings – the provisions of the Government in the Sunshine Act – only those whom the Commissioners and staff contact may have input. As a result, those with the resources to "walk the halls" at the FCC throughout the process have a huge advantage in influencing the process of deliberation. Not only do those with regular contacts know what will appear on the agenda, and therefore know when to make a "last push" to advance their positions, these same parties are the ones most likely contacted by Commissioners offices during the Sunshine Period.

It is also true that public advocates have meetings and file submissions after deadline. And, with increasing frequency, they are contacted by both Democratic and Republican commissioners during the Sunshine Period to reply to industry arguments or provide useful information to resolve disputes in last minute negotiations over rules. Indeed, given the length of FCC proceedings, the time it takes to disseminate word about a proceeding through the public interest community, and the need to respond to industry influence over time, it's often a good thing that the rules allow a way to update the record after filing deadlines close. But the "permit but disclose" rules undeniably give those with the resources to follow an issue closely an advantage over those that do not, and the FCC does not appear to take this into account. To further reduce the advantages which Washington insiders possess, the FCC should make it standard policy to allow ninety days for public comment after publication in the Federal Register and note Federal Register publication in the FCC's daily digest.

Improving Data Presentation to Foster Public Participation

The FCC maintains a public record of its proceedings. Comments (unless identified as proprietary or sensitive industry data) are publicly accessible from the FCC's website. The FCC publishes its conclusions in various reports and orders. It also collects certain other kinds of data, such as auction results, complaints, industry surveys, etc. which are frequently made available in some form or another. So in the area of raw data presentation, the FCC does reasonably well. Nevertheless, there are still a number of issues. There is no consistent set of data fields for reported data, even when staying within the same bureau and looking at the same phenomena over time. Indeed, there isn't even a consistent file format, a problem which has plagued FCC reporting of spectrum auction results. Better indexing of the FCC's Electronic Comment Filing System (ECFS), a searchable Web-based depository of rulemaking notices and filings, would be enormously helpful, not merely to scholars

doing research, but to public advocates and citizens trying to keep abreast of current issues before the commission. If you don't already know the docket number of a proceeding, it is extremely difficult to find comments filed in the proceeding. Furthermore, web-indexing technology exists which would make the scanned comments, replies, and ex parte filings enormously more accessible in the same way that Google searches have opened up topical searching on the Internet. If the FCC wants an open and honest process, making the public record more accessible to the public is an excellent and relatively non-controversial place to start.

In this regard, the agency must consider when to keep submissions confidential, or redact them to hide identifying details or information that that companies consider to be "proprietary" or trade secret. For example, industry representatives often claim that data on system deployments, subscriber counts, or other data necessary for understanding the industry cannot be revealed without giving valuable information to competitors. Of equal importance, industry whistleblowers may fear that if they come forward, they will face retaliation by the industry. These concerns must be balanced against the need to provide an open record so that all interested parties can participate meaningfully.

In practice, the FCC is often overly solicitous of proprietary data, while dismissive of concerns over industry reprisals. The FCC will liberally honor a request by a company to treat data as proprietary and issue a protective order. While advocates can still use the material in the proceeding in which the material is filed – assuming they sign the confidentiality agreement imposed by the FCC's protective order – this seals off the record from further research. On the other hand, the FCC is notorious for its refusal to protect those afraid of industry reprisals, either by providing them with the same level of confidentiality given proprietary data or by punishing regulated entities for taking reprisals. The FCC has the power to honor a request for confidentiality.[14] It also has broad power under the public interest standard to discipline licensees to discourage reprisals. It chooses not to use these powers, and everyone who might testify knows this.

RECOMMENDATIONS

Open Access for the Public, Not Just Industry Lobbyists

- Publish meeting agenda in advance. This would level the playing field for the public, which does not have lobbyists prowling the halls of the FCC to discover what items are likely to be considered by the Commissioners before public input to the process is closed.

- Publish a list of orders on circulation – items that are considered by commissioners without a need for discussion at an open or closed agenda meeting. This, too, would reduce the huge advantage that professional lobbyists have in tracking the day-to-day progress of FCC business.

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- Hold more public forums outside D.C. and provide at least thirty days notice of any public forum. The FCC has a tendency to insularity. Moving out of D.C. will bring in fresh faces and fresh perspectives. But these must be meaningful opportunities for public participation and, perhaps more importantly, must be perceived as such.

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- Establish advisory committees to get outside expertise on data collection, data processing, and data presentation, to examine the "meta-questions" about these issues. Bring together academics, advocates, industry representatives and other stakeholders to think about this as a process issue rather than in the context of a particular adversarial proceeding. At the least, do some surveys to find out the most useful way to bundle up data the agency already collects and wants to make public.

- Create better indexing of the FCC's Electronic Comment Filing System (ECFS).

Attitude Adjustment/Make Better Use of Existing Authority and Resources

- Make better use of existing rules and resources. Nothing prevents the FCC from making voluntary surveys mandatory on pain of fine or license revocation for failure to comply. Nothing prevents the FCC from using procedures to protect confidentiality when someone with information fears industry reprisals. Nothing prevents the use of FCC enforcement data and data from other government agencies in making public policy. Like Dorothy's companions, all the FCC requires is a heart, a brain, and courage.

- FCC must do a better job enforcing its own rules in a fair and consistent manner. The common perception, based on experience, is that the FCC rarely enforces its public file requirements or responds to complaints from individuals or small businesses − especially when filed against large companies with regular business before the Commission.

- Attitude adjustment. While many FCC staff do their best to assist members of the public, too many seem to regard industry representatives as "clients" while regarding members of the public as "nuisances." This is often reflected in the analysis of comments − which show a heavy bias toward industry filings.

Endnotes

[1] See Telecommunications Act of 1996, P.L. 104-104, §202(h).
[2] http://www.fcc.gov/osp/workingp.html
[3] U.S.C. §§553, 706. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).
[4] FCC, Office of the Inspector General, "Report of Investigation into Allegations that Senior Management Ordered Research Suppressed or Destroyed," October 4, 2007, 14-15.
[5] The document, disclosed in response to a Freedom of Information Act (FIOA) request, can be found at: http://www.fcc.gov/ownership/materials/newly-released/newspaperbroadcast061506.pdf
[6] 47 U.S.C. §§303(j), 308(b).
[7] *See, e.g.*, 47 C.F.R. §73.3526
[8] GAO, "Data Gathering Weaknesses In FCC's Survey of Information On Factors Underlying Cable Rate Changes," (2003); GAO, "Issues Related To Competition and Subscriber Rates In the Cable Television Industry," (2003).
[9] *In re Adelphia Communications Inc.*, 21 FCC Rcd 8203, 8229 (2006).
[10] Comcast form 10-Q, filed with the SEC October 31, 2006, available at http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-sec&secCat01.3_rs=141&secCat01.3_rc=20 (last viewed 12/11/07).

[11] In 2000, the FCC adopted a rule prohibiting a cable operator from controlling more than 30% of all subscription television subscribers. In 2001, a federal appeals court found that the FCC had not adequately justified the rule and remanded the rule for further justification.. *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1136, 1139 (D.C. Cir. 2001). The FCC has taken the position that the ownership limit remains in effect because the appeals court reversed and remanded the rule rather than vacating the rule. *In re Adelphia*, 21 FCC Rcd at 8225.
[12] Chairman Powell ultimately held one public hearing in Richmond, Virginia.
[13] 47 CFR §§1.1200-1.1216.
[14] 47 CFR §0.459.