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Academic Research and its Limited Impact on Telecommunications Policymaking

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In an ideal world, uncontaminated by partisanship and political agendas, academic researchers have much-needed qualifications and skills that can contribute to rational decision-making by the Federal Communications Commission (FCC). By law, the FCC has to combine its in-house expertise with a transparent and complete collection of evidence when establishing rules, regulations and policies. Sadly, the FCC's "Notice and Comment" rulemaking proceedings rarely include filings from academic researchers lacking financial sponsorship from a stakeholder with the resources and incentives to steer the Commission to a preferred outcome. Absent a financial incentive, both tenured and tenure track professors eschew policy advocacy, largely because such efforts have little influence on the FCC and also generate limited recognition as academic contributions.

This essay will consider whether and how academic researchers might achieve a greater impact even when the FCC displays an inherent bias toward results-driven decision-making. With increasing regularity, the FCC generates and seeks empirical data that supports preferred or preordained policies. For example, the Commission established a low bit rate threshold to support the conclusion that robust high-speed broadband competition exists in the United States. The Commission also sought to demonstrate that à la carte access to cable television programming would foist higher costs on consumers, but later reversed its position possibly because of reassessment of the political liabilities from its initial findings.

Additionally, stakeholders happily support the Commission's agenda by sponsoring academic and consultant research and by submitting advocacy documents masquerading as rigorous in-house, academic or third party research. The essay concludes with recommendations that the FCC seek out and sponsor peer-reviewed academic research as it has done recently in assessing the impact of concentrated media ownership.¹

¹ See Federal Communications Commission, Media Bureau, Peer Review; available at: http://www.fcc.gov/mb/peer_review/peerreview.html

I. The Need for, and Lack of Peer-Reviewed Academic Research

The FCC must engage in rational decision-making, based on a complete evidentiary record. When the Commission acts arbitrarily, capriciously or abuses its discretion,² reviewing courts should reverse the regulatory decision and require a better work product.³ Courts readily defer to regulatory agency expertise and interpretation of statutory requirements.⁴ But at the risk of engaging in judicial activism, courts will not defer and will overturn agency decisions that do not adequately reflect empirical evidence and decision-making supported by a complete evidentiary record.⁵

The FCC has achieved a mixed record in having its decision making pass muster with appellate courts. In far too many instances a reviewing court saw the need to refrain from its general inclination to defer to the FCC's expertise, because the Commission did not adequately support its conclusions. Too often the FCC seeks a policy outcome, often deregulatory in nature, based on a political agenda, or

² See 5 U.S.C. § 706(2)(A).

³ “[A regulatory] agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). “If the agency has failed to provide a reasoned explanation for its action, or if limitations in the administrative record make it impossible to conclude the action was the product of reasoned decision-making, the reviewing court may supplement the record or remand the case to the agency for further proceedings. It may not simply affirm.” *Qwest Corp. v. FCC*, 258 F.3d 1191, 1198-99 (10th Cir. 2001) (determining that the FCC failed to provide adequate justifications to prove rational decision making in calculating subsidy mechanism for promoting universal service in high cost area), *citing Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir.1994).

⁴ *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (establishing a standard for assessing the reasonableness of a regulatory agency's interpretation and implementation of a statute, including ambiguously worded ones).

⁵ See, e.g., *Digital Broadcast Content Protection*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 23550 (2003 *rev'd and vacated* *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (FCC exceeded statutory authority when it required that equipment on consumer premises to process “broadcast flag” digital rights management instructions); *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2902 (2005) (reversing as inadequately justified liberalized numerical limits for local television ownership, local radio ownership, and cross-ownership of media within local markets); *Fox Television Stations, Inc. v. Federal Communications Commission*, 489 F.3d 444 (2nd Cir June 4, 2007) (finding that the FCC failed to articulate a reasoned basis for its new policy regarding “fleeting expletives” and that the new policy constituted arbitrary and capricious decision making); *pet. for cert. pending* (07-582, Nov. 1, 2007).

because a particular political or economic philosophy supports the outcome. Sadly, theory and philosophy appear to drive too many policies, regulations and rules.

It should come as no surprise that despite being established as an independent and expert regulatory agency, the FCC cannot operate outside of politics. The President appoints Commissioners based, in part, on their political party affiliation. Congress authorizes the FCC's budget and regularly holds "oversight hearings" where individual Senators and Representatives may regulate "by lifted eyebrow" in support or opposition to an FCC initiative. However, the political sensitivity of the FCC appears to have increased recently because of two relatively new developments:

- 1) As the scope, reach and influence of the Internet has grown, so too has the number of advocacy groups, particularly ones affiliated with, or financially supported by stakeholders; and
- 2) Faced with the need to generate a comprehensive evidentiary record, the FCC increasingly relies on sponsored research not subject to peer review.

Technological and marketplace convergence supports the growing importance of the Internet as a primary medium for delivering previously separate types of content. Incumbents and market entrants alike seek limited regulation, and the majority of FCC Commissioners from both parties agree. But at some point, government oversight might provide necessary guards against anticompetitive conduct, or practices that harm consumers and the public interest. Deregulatory advocates predictably seek to dissuade the FCC from identifying instances of market failure, or other reasons for government regulation. Advocates for regulatory safeguards seek to persuade the Commission of the need for ongoing light-handed oversight.

To bolster advocacy and to contribute to a perception of public support, stakeholders have unprecedented options for securing additional filings in an FCC Notice and Comment rule making. Countless new advocacy groups purport to represent the public interest, even as they typically do not fully disclose their affiliations and financial sponsorship. The term "astroturf organization" ⁶ refers to an enterprise that purports to operate as a "grassroots" representative of the public even though its funding largely comes from companies with a major financial stake in the outcome of an FCC rulemaking.

An ever increasing number of foundations, institutes, centers and organizations offer assistance to the FCC in the Commission's generation of an evidentiary record. However, most of the work product

⁶ "One of the underhanded tactics increasingly being used by telecom companies is 'Astroturf lobbying' — creating front groups that try to mimic true grassroots, but that are all about corporate money, not citizen power." Common Cause, *Wolves in Sheep's Clothing: Telecom Industry Front Groups and Astroturf* (Aug. 10, 2006); available at: <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1499059>

represented as empirical research and attached to advocacy filings suffers from the taint of financial support from organizations with obscure or undisclosed affiliations with specific stakeholders. Put more bluntly, much of the research filed with the FCC would not pass muster with rigorous peer review, not only because of the financial strings attached to the product, but also because the research seeks to endorse a preordained outcome. The FCC receives reams of "research" documents, but little if any of it reflects research as opposed to rationales for specific policy recommendations.

II. Case Studies in Results-Driven FCC and Sponsored Research

A. Broadband High-Speed Internet Access Statistics

The FCC has received justly deserved criticism for the way in which it has compiled statistics of broadband market penetration and the inferences it has derived from the collected data. For example, the Commission uses ZIP codes as the geographical measure of broadband penetration and considers the entire ZIP code served if one user exists, regardless of circumstances and prices paid.⁷ This measure overstates the degree of real competition for broadband services, particularly in light of the Commission's own data showing cable modem and DSL carriers having a national market share of between 88% and 96%.⁸ The Commission also considers broadband to constitute any service that operates at 200 kilobits per second broadband or higher in only one direction.⁹

⁷ The Commission now proposes to improve its statistics compilation. See FCC Expands, Improves Broadband Data Collection, Public Notice, (March 19, 2008); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280909A1.doc

⁸ Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2007* (March 2007); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf (estimating 88.1% market share with cell phone service regardless of actual bitrate, having a 10% share). The Commission's previous study stated that cable modems served 55.2% of the residential lines while asymmetric DSL connections accounted for 40.1%. The remaining 4.7% were served by symmetric DSL lines, or traditional wireline connections, fiber connections to the end user premises, and other types of technology including satellite, terrestrial fixed or mobile wireless (on a licensed or unlicensed basis), and electric power line. See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf

⁹ "We use the term 'high-speed' to describe services that provide the subscriber with transmissions at a speed in excess of 200 kilobits per second (kbps) in at least one direction. 'Advanced services,' which provide the subscriber with transmission speeds in excess of 200 kbps in each direction, are a subset of high-speed services." Federal Communications Commission, *High-Speed Services for Internet Access: Status as of June 30, 2007*, 1, n. 1, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf

The FCC's statistics provide the basis for the Commission, stakeholders and outside researchers to conclude that a vibrant and robustly competitive broadband market exists.¹⁰ Had the Commission used a higher bitrate standard and a more granular measure of penetration, the statistical compilation would look less sanguine. The Organization for Economic Cooperation and Development (OECD) has compiled broadband market penetration statistics that show the United States lagging many nations, despite using only a slightly higher 256 kilobits per second baseline standard for broadband.¹¹

Remarkably, the mere presence of conflicting statistics triggered official United States government opposition. Both the National Telecommunications and Information Administration and the State Department challenged the OECD staff compilation as flawed.¹²

B. À la carte Access to Cable Television Programming

The FCC has developed an inconsistent record on whether and how individual channel access to cable television programming would save consumers money in lieu of the current operator packaging of programming tiers containing many channels. The Commission initially concluded that à la carte program access would not save consumers money based on its research and most of the sponsored research it reviewed.¹³ The Report estimated that the impact on retail rates of pure or mandatory à la carte sales would benefit only those consumers who would purchase fewer than nine programming networks. Because most consumers watch 17 or more channels, the Report concluded that most consumers likely would incur an increase in their monthly bills if they used a likely à la carte pricing model. The Media Bureau concluded that a 17-channel à la carte purchase would trigger a monthly rate increase of between 14% and 30%.

¹⁰ See, e.g., Greg Sidak, A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet, 2 J. COMP. L. & ECON., No. 3, 349-474 (2006)(using FCC statistics and claiming dial-up telephone service constitutes a competitive alternative to broadband services to conclude that a robustly competitive Internet access marketplace exists).

¹¹ See Organization for Economic Cooperation and Development, OECD Broadband Portal; Broadband Subscribers per 100 Inhabitants by Technology (June, 2007); available at: <http://www.oecd.org/dataoecd/21/35/39574709.xls>

¹² The State Department made the issue something of a diplomatic affront to the U.S. See http://www.ntia.doc.gov/ntiahome/press/2007/State_OECD_042407.pdf. NTIA offered explanations why scope of broadband access in places such as government offices and coffee shops mean that the OECD ranking underestimates market penetration. See http://www.ntia.doc.gov/ntiahome/press/2007/ICTleader_042407.html

¹³ Federal Communications Commission, Media Bureau, *Report on the Packaging and Sale of Video Programming Services to the Public*, (Nov. 18, 2004); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf

The Report also included several policy recommendations that Congress and the Commission should consider to enhance consumer choice, foster competition and provide consumers with the tools to prevent objectionable programming from entering their homes. These recommendations include promotion of multichannel video programming delivery (MVPD) competition which would generate downward pressure on rates as has occurred with aggressive marketing by direct broadcast satellite operators. The Media Bureau suggested that policymakers consider creating incentives for operators to provide consumers with more control and access to programming such as that provided by pay-per-view and video-on-demand services. The Media Bureau also suggested that rapid deployment of broadband networks would create additional content access options for consumers such as a per game or subscription model access to Major League Baseball game coverage via the Internet. The Media Bureau also noted that many retransmission consent negotiations between content providers and cable systems may bundle less desired channels in exchange for a lower carriage rate for more desired programming. The FCC did not consider whether such bundling might crowd out more desirable programming and possibly raise both public interest and antitrust concerns.

In a stunning reversal of its previous research and analysis, the FCC now asserts that à la carte access to cable television programs could save many consumers money and would not result in a reduction of television viewership. The Commission's "Further Report on the Packaging and Sale of Video Programming Services to the Public"¹⁴ reexamined the conclusions and underlying assumptions of the earlier Media Bureau report on à la carte submitted to Congress in November 2004. The Commission reported mistakes in previous calculations of per-channel cable television costs failed to net out the cost of broadcast stations, and accordingly overstated costs by as much as 50%.

The Commission also abrogated its previous finding that à la carte would cause consumers to watch nearly 25% less television, or over two fewer hours of television per day. The Further Report stated no reason to believe that viewers would watch less video programming than they do today simply because they could choose the channels they find most interesting. The Further Report states that "many consumers could be better under an à la carte model."¹⁵

The Commission revisited the issue of à la carte pricing at the behest of several Representatives and Senators. In light of a complete reversal in its findings, the Commission either has engaged in shoddy research and review of sponsored research, or it has responded to a shift in the political winds and has changed its interpretation to situate the Commission in favor of the now politically advantageous position of supporting à la carte program access.

¹⁴ Federal Communications Commission, Further Report on the Packaging and Sale of Video Programming Services to the Public (Feb. 9, 2006); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf

¹⁵ *Id.* at ¶13.

III. Institutional and Practical Constraints on Academic Research

Most policy advocacy lacks independent, peer-reviewed contributions for several reasons. First, with rare exception, the FCC lacks the finances or inclination to sponsor such independent research. It appears that the Commission must first suffer an embarrassing judicial rebuke before seeking such untainted research. For example, after a stinging remand from the Third Circuit Court of Appeal in *Prometheus v. FCC*¹⁶ on the failure to generate a record supporting relaxed media ownership restrictions, the FCC adopted a Further Notice of Proposed Rulemaking that specifically commissioned peer-reviewed studies. In this rare instance, the Commission implicitly recognized that sponsored research might not provide sufficient analysis on such issues as: how people get news and information; the degree of competition within and between types of media; marketplace changes since the Commission last reviewed its ownership rules; the Commission's promotion of local ownership; minority participation in today's media environment; the availability of independent and diverse programming in today's media environment; and the impact of ownership on the production of children's and family-friendly programming. Absent a stinging judicial rebuke, the FCC does not financially sponsor or encourage independent academic research.

The lack of academic research in the policymaking process also occurs, because academics prefer traditional peer-reviewed forums for their work. Untenured academics need to acquire a record of publications in peer-reviewed journals. Even tenured academics have concerns whether their policy-oriented research might generate controversy and adversely impact prospects for securing research grants. The path of least resistance favors targeting research in academic journals instead of seeking to influence regulatory agencies' policies.

IV. Conclusions and Recommendations

Both tenured and untenured academics need to perceive policy-oriented research as an enhancer of their reputation and a worthwhile endeavor. Promotion and tenure committees should recognize that policy research constitutes a blend of national service and rigorous research, despite the likelihood that peer review may not take place.

For its part, the FCC should seek out and sponsor academic research, not just when it is politically advantageous or necessary as a result of a court remand. Of course this requires the Commission to have an open mind on policy issues that could trigger many different outcomes. The FCC needs to quit driving policy research on the basis of politics, economic and regulatory philosophy or a preconceived notion of what the agency should decide. The need to create a complete evidentiary record requires the FCC to have an open and inquiring mind.

¹⁶ *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (2004); *cert. denied*, 125 S. Ct. 2902 (2005).

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