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Research In Government Agency Decisions: Observations about the FCC

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The Federal Communications Commission (FCC) is considered by Congress and courts to be an "expert" agency and is tasked with a wide range of decisions that rely on expertise in engineering, economics and statutory construction. This presumed expertise allows courts to grant "deference" to the agency's decisions. In appeals of FCC decisions, the adage that applies is, "Tie goes to the FCC."

On engineering matters, this often makes the most sense. The FCC's engineers can use field or predicted measurements to decide, for example, if two radio stations will interfere or two satellites are too close to each other. And, unless the judge's law clerk or the judge has the avidity or expertise to look into the results, it's unlikely that the FCC's decision would be disturbed on appeal.[1]

Similarly, on some but not all interpretive technical policy issues, the FCC judgment won't be disturbed. In recent years, courts have deferred to such matters as what rate to charge a cable company when it attaches to a utility pole to provide high speed data service, how to define cable modem service, or whether to prohibit integrated security in set-top boxes to promote a retail market for cable boxes.

Where economics are involved, the FCC has been granted less deference. Ownership limits set by the FCC have been tossed out, with a series of Goldilocks-like decisions that decree some limits too high, some too low. These include how many subscribers a single cable operator can control (court said too low)[2]; how many program networks that a cable operator carries it can also own (too low)[3]; whether a broadcaster can also own a newspaper (pending); or limits to the number of stations one broadcaster can control (too high)[4].

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[1] Procedural irregularities in deciding technical matters can lead to reversal, however. See American Radio Relay League, Inc. v. FCC No. 06-1343 (D.C. Cir. 2008).

[2] Time Warner Entertainment Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001).

[3] Id.

[4] Prometheus Radio Project v. FCC, 373 F.3d 272 (3d Cir. 2004).

Ownership cases affect communitarian values like control and viewpoint diversity (e.g., ownership) that competition laws may not fully measure. Otherwise the field would be (and maybe should be) completely occupied by competition law enforced by the FTC and the Justice Department. In this sense they resemble the morality issues faced by the FCC for indecent broadcasts and violent programming. With these matters, the five voting Commissioners are called on to make policy judgments that don't lend themselves to answers in the same way that an engineer can reliably declare. So is the FCC really an "expert" on questions left to it? And can research help bridge the gap that in reality exists between the five appointed Commissioners, with their subjective viewpoints, assigned to make policy decisions?

Agency rulemaking is an activity that naturally invites studies by interested parties and by the agency itself. It's worth considering the differences between party-supplied research and that which the agency commissions. Parties will only submit studies that support their viewpoints, of course, and they will not be subject to peer review as such. Instead, the study design — and this applies to technical as well as economic studies — is integral to adducing for the commenting party the evidence it wants to be relied on by the FCC.

So when, for example, Consumers Union wants to demonstrate rising cable prices, it will find a time period of steepest prices and present that data. It might not want to adjust for inflation over that period. It may not want to weight prices based on what customers actually subscribed to, i.e., what share of customers took the package of services represented by steep curve. It may want to exclude how many people actually paid the rate-card rate as opposed to a promotional rate. And it will not want to consider the value, per dollar spent: for example, the number of hours viewed or the quality of programming (original vs. reruns, high budget vs. low budget).

On the other hand, if the cellular industry association wants to show that cell phone rates have declined, they would modify the raw year-to-year data by just the sort of adjustments that Consumers Union would want to ignore in presenting the case for high cable rates. It would adjust for inflation. It would show that the cost per minute declined. It would emphasize how the total number of minutes had increased.

The foregoing examples simply are variants on the old saw that statistics can lie. But cast as "studies" by commentors, they take on the weight that a decision maker chooses to make of them. The "soaring cable rate" story has been a consistent one invoked by the current FCC Chairman [Kevin Martin]; whether in competition reports or public speeches, he has not made the adjustments that industry would seek as elemental fairness in telling the whole story. It is worth noting that in making the case against cable, the Chairman has compared cable rates to wireless rates — where adjustments *are* made — to show how the two industries' pricing behavior has diverged.

Even more elemental in considering data studies is the source of the data being analyzed. How do commentors or the FCC get the data from which to draw broad trends where the study doesn't involve, say, a field test of equipment that it itself conducts? The FCC can rely on U.S. Household Census data where it is available (and one guesses is itself subject to claims about reliability). It can collect data from industry itself. It can look to filings at other agencies, such as the Securities Exchange Commission, where the accuracy of the reported information is backed by the risk of criminal liability. Or it can look to neutral third party sources that collect the data for purposes unrelated to establishing government policy.

One would think such data collected by commercial services would be a safe place to go. But the FCC's recent "70/70" meltdown shows that is not always the case. There the FCC was attempting to see if a statutory threshold had been reached: Are 70% of households that have cable available to them actually subscribing? If this threshold was reached, the 1984 Cable Act said the FCC could consider additional regulation of the industry in regard to leased access obligations (although some thought the FCC Chairman would use the finding for broader program regulation like a la carte). Cable subscribership climbed from 1984 through the early 1990s; in 1994, DirecTV launched and the next 14 years have seen competitive inroads to cable by that company, Dish TV (the other major Digital Broadcast Services company), and more recently the video services of Verizon and AT&T. Cable penetration, which had never reached more than the mid-to-high 60% of homes, has been on the decline. The FCC's own surveys found this.

Nevertheless, Warren Publishing does its own survey of cable systems which it has used to produce its annual "Cable TV Factbook" for decades. Participation in the survey is entirely voluntary, however, and cable system operators can and do submit incomplete responses. For instance, while a cable operator may be willing to report the number of subscribers it has in a particular system, it may not want to report the number of households passed, fearing that such disclosure would provide competitive data useful to DBS or, now, the telcos.

It turned out that this is what happened: Warren reported a more complete set of cable subscribers and an incomplete number of households passed. The resulting quotient — a conceivably accurate numerator and a decidedly underreported denominator — swelled cable's penetration to above 70%. Because a "study" based on this "third-party" data proved useful to reach the 70/70 conclusion, it was emphasized in the draft report circulated by the Media Bureau at the Chairman's behest to the other Commissioners. Worse, the FCC's own survey of cable penetration — which pegged the number in the mid-50 percentile — was excluded from the draft report and shared with other FCC Commissioners only the night before the agency was to consider the 70/70 report. In his defense, the Chairman pointed out that the cable industry itself had cited Warren data in the past when it suited it, so fair was fair. Nevertheless, the Warren publishing company disavowed the use of its data for public policy purposes, indicating that the Factbook's utility is directed at purposes other than its limited ability to estimate whether the 70/70 threshold was passed.

Sometimes the FCC will seek academics or research think tanks to prepare studies. Ten such studies were commissioned as part of the FCC's broadcast ownership review. Four independent economists were asked to comment on the record developed by interested parties in the FCC's à la carte study. The FCC used to conduct more of its own studies — the Office of Plans and Policy could be counted on for several papers each year — but that work ended several years ago as the Office was renamed and assigned a different function.

To generalize, it is often true that studies will be promoted that tend to support the policy inclinations of the Chairman, under whose direction, after all, every draft decision is made. On some issues, where the Chairman couldn't care less about the outcome, or doesn't want to be tagged politically as having nudged the process in a particular direction, studies can be helpful as a justification for the outcome. Or, in that rarer instance, they can form the basis for informed decision making where the expertise in designing, executing, and interpreting the study can come into play.