RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

THE FCC'S TUMULTUOUS YEAR IN 2003: AN ESSAY ON AN OPPORTUNITY FOR INSTITUTIONAL AGENCY REFORM

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INTRODUCTION

For many years, the Federal Communications Commission (FCC or the Commission) has not been the sleepy backwater government agency it once was. Almost all knowledgeable observers of the Commission's work will agree that the year 2003 was an especially tumultuous and difficult one for the agency. Indeed, so much that out of the tumult and in conjunction with the fact that today's communications marketplace is characterized by growing competition in almost all market segments, conditions may be ripe

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for a serious debate concerning the nature and structure of the FCC. This debate should include the issue of whether a newly-reformed "FCC" should remain a so-called "independent" regulatory agency.

Since passage of the landmark Telecommunications Act of 1996,[1] (the 1996 Act) the most comprehensive revision of the nation's communications laws in over sixty years, the FCC has increasingly been in the limelight as it has struggled to implement the new statute that its framers said was intended "to provide for a pro-competitive, de-regulatory national policy framework."[2] In 2003 the FCC frequently generated headlines, and not just on the business pages, in connection with long-awaited and much-anticipated major rulings involving media ownership restrictions, broadband policy initiatives, and telephone regulation. To some extent, the hullabaloo surrounding the FCC's actions was occasioned by the normal difficulties the Commission experiences in implementing the often admittedly vague directives contained in the 1996 Act,[3] and its predecessor statute which it amended, the Communications Act of 1934.[4] Of course, the FCC is not to blame for struggling with ill-defined and sometimes contradictory statutory mandates. Nevertheless, even assuming few changes in the substance of the FCC's governing statutory directives, I suggest the agency could function more effectively and efficiently, and reach more rational determinations, with institutional reforms of a structural nature.

While this Article focuses on two major FCC actions that occurred during 2003, these particular matters, and almost every other matter that comes before the Commission, must be considered against the backdrop of an environment that is much different than when the Commission was created. The communications industry operates in an era of rapid

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at various sections of 47 U.S.C.) [hereinafter 1996 Act or the Telecom Act of 1996].

2. H.R. CONF. REP. NO. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124.

3. In the first case to reach the Supreme Court construing a provision of the 1996 Act, Justice Scalia concluded his majority opinion this way: "It would be a gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or even self-contradiction." AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999).

4. 47 U.S.C. § 151 *et seq*. Indeed, the Communications Act, as amended, delegates authority to the FCC to act "in the public interest" in nearly one hundred separate statutory provisions. *See generally* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?* 53 FED. COMM. L. J. 427, 428-29 (2001) (arguing "that some limits *do* constrain Congress's ability to transfer lawmaking authority to another entity . . . [and] those nondelegation boundaries have been transgressed when Congress authorizes its delegatee . . . to simply act in the 'public interest'"); *see also id.*, Appendix A, at 450-67; Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. 605, 607 (1998) (discussing the parameters of the public interest standard as it exists today).

technological change enabled and propelled by the digital revolution. Innovative digital technologies, that often enjoy declining cost curves, facilitate competitive entry in the various traditional communications market segments, whether voice telephony, video, data, and Internet services. And, in a digital world in which "a bit is a bit is a bit," technological convergence, in turn, leads to the breakdown of existing regulatory service distinctions as historically separate services[5] are bundled into new packages.[6] New services and products, such as WI-FI, Internet telephony, cable telephony, wireless telephones with video and photographic capabilities, DVDs, and broadband Internet services, are rapidly penetrating the consumer marketplace.

The combination of the advent of new services and the emergence of unfamiliar new providers, in addition to rapid-fire business successes and failures, may bring a sense of public unease and uncertainty. In this dynamic market-disrupting Schumpeterian environment, [7] it is no wonder that there is a heightened interest in the Commission's agenda and its regulatory work—not only among the businesses subject to the FCC's regulatory mandates and the technology *cognoscienti*, but among the broader public as well.

This heightened visibility for the FCC and 2003's high-profile internal battles, coupled with the changed marketplace environment, may provide the opportunity and impetus for fresh thinking about whether a different type of agency would be better suited to carry out its responsibilities in the twenty-first century.[8] More specifically, the FCC's controversial actions during 2003 on the media ownership and telecommunications regulatory fronts have increased the sense, at least in many quarters, that the communications industry generally remains plagued by outdated regulatory requirements, by a lack of clarity in the agency's decisions and regulations, and by embarrassing delays in reaching decisions and promulgating new rules.[9] During the spring of 2004, the leaders of the congressional

5. *See* 47 U.S.C. § 153 (6), (7), (20), (27), and (46) (2000) (demonstrating that the Communications Act contains separate service classifications for "broadcasting," "cable service," "information services," "mobile service," and "telecommunications services" and that much of the body of the act is taken up with setting forth detailed and complex regulatory regimes for the separately defined services).

6. *See* ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983) (exemplifying an early prognostication regarding the likelihood that the emergence of digital technologies would lead to a proliferation of new modes of mass communications).

7. *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 82-85 (1942) (concluding that capitalism is a form of economic change that never remains stationary).

8. This is not the first call for a rethinking of the FCC's structure and organization. *See, e.g.*, Harry M. Shooshan III, A Modest Proposal for Restructuring the Federal Communications Commission, 50 FED. COM. L. J. 637 (1998), and the articles and books cited therein.

9. For my own perspective on telecommunications regulatory issues, see Randolph J. May, *The FCC and Telecom Recovery: A Scorecard for Evaluating the New Unbundling*

committees in both houses of Congress responsible for FCC oversight stated that Congress needs to rewrite our nation's communications laws.[10]

So, perhaps the time is right to consider reforms that will enable the agency to function more efficiently and to produce sounder decisions while, at the same time, making it more politically accountable. Before reviewing the turmoil of 2003 and suggesting potential avenues of institutional reform, however, it is useful to have an understanding of the theoretical underpinnings that inspired the creation of the FCC.

I. BORN IN THE PROGRESSIVE ERA MOLD: EXPERTISE AND INDEPENDENCE PRESUMED

Like other so-called independent regulatory agencies, the FCC was created in 1934 in the image of a somewhat idealized Progressive-era and New Deal vision of government administration. The theory was that the FCC and other multimember agencies, such as the Securities Exchange Commission and the now-extinct Interstate Commerce Commission and Civil Aeronautics Board, with a bipartisan cohort of expert commissioners, largely would be insulated from politics in carrying out their specialized regulatory missions.[11]

Rules, 2003 MICH. ST. DCL L. REV. 645 (Fall 2003). That volume, the Fall Issue of the 2003 The Law Review of Michigan State University Detroit College of Law, which published papers from the Fourth Annual Quello Communications Policy and Law Symposium, contains a variety of perspectives on the question of whether the FCC's recent actions have been too regulatory or not deregulatory enough. *See id.* at 529 (articles include: Johannes M. Bauer *et al.*, *The State of Telecom: Realities, Regulation, Restructuring*; Cleland *et al.*, *Telecom Financial Realities*; Wiley *et al.*, *Current Regulatory Realities: Overcoming the Regulatory Quandary*; W. Russell Neuman, *Ways Out: Reconciling Industry Restructuring and Competition*; Gerald W. Brock, *Technological Progress and Regulatory Stability*; Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*; Christopher S. Yoo, *New Models of Regulation and Interagency Governance*; Jim Rossi, *Beyond Goldwasser: Ex Post Judicial Enforcement in Deregulated Markets*; Philip J. Weiser, *Cooperative Federalism and its Challenges*; J. Gregory Sidak, *Remedies and the Institutional Design of Regulation in Network Industries*; Barbara A. Cherry, *The Political Realities of Telecommunications Policies in the U.S.: How the Legacy of Public Utility Regulation Constrains Adoption of New Regulatory Models*). The purpose of this Article is not to delve deeply into the substantive merits of particular FCC actions, but rather to show how the debate and actions surrounding two of 2003's most controversial regulatory issues suggest the desirability of considering institutional agency reform in the context of the larger communications policy debate. *Id.*

10. *See, e.g.*, Christopher Stern, *McCain Sets Hearings on Phone Law*, THE WASHINGTON POST, Apr. 24, 2004, at E1 (noting that Sen. Ted Stevens, R-Ala., who will become chairman of the Senate Commerce Committee if the Republicans retain control of the Senate, "has made clear that he intends to take a close look at the Telecommunications Act with an eye toward a major rewrite"); Howard Buskirk, *Barton Says Commerce Committee Will Consider Cutting "E-Rate" Program*, TR DAILY, Mar. 4, 2004 (reporting that Rep. Barton, R-Tex., the new chairman of the House Energy and Commerce Committee said, "the committee would start a rewrite of the Telecommunications Act of 1996 this year, but most of the work will have to get done in the 109th Congress").

11. *See* John F. Duffy, *Symposium Overview: Part III: A New Role for the FCC and*

The extent to which the Progressive-era theory blinked reality from the outset is illustrated starkly by a statement in the Senate Report from the Committee on Interstate Commerce that accompanied the legislation creating the Federal Radio Commission,[12] the FCC's immediate predecessor and the model for the agency as it exists today. The Senate Committee stated that radio regulation "is fraught with such great possibilities that it should not be entrusted to any one man or to any administrative department of the Government."[13] Instead, the committee concluded, regulatory authority should be placed in the hands of "one independent body."[14]

In other words, the legislators apparently had convinced themselves—or were bent on convincing others—that the new multimember commissions were to be constructed so that, at least in some existential sense, these entities ought not to be thought part of "the Government." Even if we assume that the Senate report authors did not intend to be taken literally in positing that the new FCC's predecessor commission would not be part of "the Government," most assuredly they did mean to imply that the new agency would be largely insulated from the contentiousness of ordinary politics that normally inheres in the business of government regulation.

The agencies by law would have a bipartisan membership, with no more than the number constituting a majority from the same political party.[15] The commissioners would have fixed terms that expire on a staggered basis, thereby increasing the likelihood for appointment by presidents from different political parties.[16]

Senator Dill, the chief sponsor of the legislation that created the Radio Commission, urged the appointment of commissioners who would be "men of big ability and big vision."[17] With such visionaries on board, the Senate Committee report theorized the Commission would be on its way to

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State Agencies in a Competitive Environment?, 71 U. COLO. L. REV. 1071 (2000); *see also* THOMAS K. MCCRAW, THE PROPHETS OF REGULATION 153-221 (1984) (discussing the rise of the Progressive and New Deal-era independent regulatory agencies, especially including the FCC, and the theory behind the creation of these "expert" agencies). In addition, for a valuable comprehensive study of the independent agencies that includes historical perspective, analysis of relevant legal issues, and an empirical examination of modern organization and practice at independent agencies, see Marshall J. Breger & Gary J. Edles, *Established by Practice: the Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000). Much of what follows in this section can be found in more expansive fashion in the Duffy, McGraw, and Breger & Edles works.

12. Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927).

13. S. REP. NO. 69-772, at 2 (1926).

14. *Id*.

15. *See* Breger & Edles, *supra* note 11, at 1135-38, and Appendix (indicating that various independent agencies, including newer ones like the Commodities Futures Trading Commission, generally adhere to this model); *see also* 47 U.S.C. § 154 (2000) (outlining the statutory provisions relevant to the organization and structure of the FCC).

16. 47 U.S.C. § 154 (2000)

17. 67 CONG. REC. 12,354 (1926) (statement of Sen. Dill).

becoming "an expert authority" that could tackle "the many and complex problems" presented by new technologies, such as radio.[18]

It was in this context that the theorists of the rising new administrative state rhapsodized about the new "science of administration." James Landis, a Felix Frankfurter protégé, Harvard Law School dean, Federal Trade Commission commissioner, and chairman of the Securities Exchange Commission, was most likely the leading New Deal exponent of the specialized regulatory agencies. In his seminal 1938 book, *The Administrative Process*, which was influential in shaping thinking about government administration for succeeding generations of administrative law scholars, Landis argued: "In terms of political theory, the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems."[19] In the same vein, Supreme Court Justice Felix Frankfurter, Landis's Harvard professor and mentor, enthusiastically embraced the notion that the New Deal agencies should operate pursuant to vague delegations of authority, such as the FCC's "public interest" standard:

> There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation.[20]

There can be no doubt about the sweeping nature of this New Deal-era vision of the administrative state, and the sheer faith placed in the value of expertise put to the service of government administration. But query whether, apart from any doubts about the constitutionality of independent agencies like the FCC,[21] there will be no withdrawal "from these experiments,"[22] and if we must expand them, whether we approve or not? After next considering conduct associated with the FCC's two most significant and controversial 2003 proceedings, I suggest that it is time to consider reforming the original experiment.

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18. *See* S. REP. NO. 69-772, at 2-3 (1926).

19. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1 (1938).

20. FCC v. Pottsville Broad. Co., 309 U.S. 134, 142 n.4 (1940) (quoting Elihu Root, in 41 A.B.A. REP. 355, 368-69 (1916)).

21. For articles discussing this issue, see the special volume of the *AMERICAN UNIVERSITY LAW REVIEW* entitled *A Symposium on Administrative Law: The Uneasy Constitutional Status of Administrative Agencies*, 36 AM. U. L. REV. 277 (1987). *See also* Breger & Edles, *supra* note 11, at 1155-60; Lawrence Lessig and Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (discussing of the constitutionality of the independent agencies).

22. *Pottsville Broad. Co.*, 309 U.S. at 142 n.4 (quoting Elihu Root, in 41 A.B.A. REP. 355, 368-69 (1916)).

II. TUMULT INSIDE AND OUT: THE TRIENNIAL REVIEW AND MEDIA OWNERSHIP PROCEEDINGS

The two most significant and controversial FCC proceedings during 2003, the agency's *Triennial Review* and *Media Ownership* rulemakings, provides an impetus for considering whether or not the FCC, which remains essentially unchanged from its Progressive-era incarnation, would benefit from structural reform. The events that transpired are important for what it says about the functioning of the agency apart from anything that was decided as a substantive matter in the two rulemakings. Whatever one may think about the policy direction the FCC is moving toward in this time of dynamic technological change and increasing competition—and I think it is moving too slowly to eliminate or reduce outdated regulatory burdens[23]—the notion of the FCC as an institution engaged in sound collegial decisionmaking through the application of its presumed specialized expertise is called into question by last year's experience.

First, consider what happened—or, more accurately, what did not happen—for too long in the FCC's *Triennial Review* proceeding.[24] This is the rulemaking in which the agency determined the extent to which incumbent telephone companies, like Verizon, must share their local telephone networks with competitors, such as AT&T.[25] Acting at the direction of the Supreme Court and a federal appeals court, both which held that the FCC's existing rules unlawfully required excessive facilities sharing,[26] the FCC *appeared* to vote at a public meeting on February 20, 2003 to eliminate the sharing mandate for newly-installed broadband facilities, while leaving mandatory sharing largely in place for existing narrowband voice facilities.[27]

The FCC should have gone further in a deregulatory direction by cutting back more substantially on the facilities-sharing mandates for narrowband services, and in fact, the FCC's decision was once again reversed in part on

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23. *See* Randolph J. May, *The FCC and Telecom Recovery: A Scorecard for Evaluating the New Unbundling Rules*, 2003 MICH. ST. DCL L. REV. 645 (Fall 2003); *see also* Randolph J. May, *Heeding the Blast of Schumpeter's Trumpet*, CNET News.com, March 25, 2004, *available at* http://news.com.com/Heeding+the+blast+of+Schumpeter%27s+trumpet/2010-1032_3-5179091.html (discussing the FCC's approach towards changing technology, increasing competition, and new regulations).

24. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd. 16978 (2003) [hereinafter *Review*], *corrected by Errata*, 18 FCC Rcd. 19020 (2003), *aff'd in part and rev'd in part*, United States Telecom Ass'n v. FCC, 359 F. 3d 554 (D.C. Cir. 2004), *cert. denied*, AT&T Corp. v. United States Telecom Ass'n, 2004 U.S. Lexis 6711 (U.S., October 12, 2004).

25. *See id*.

26. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999); United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002).

27. *See Review*, *supra* note 24.

this basis.[28] For present purposes, however, the problem is that the Commission took six months after the February 2003 open meeting vote to issue its official decision in August 2003.[29] Shortly before the agency's order was finally released, FCC Chairman Michael Powell admitted the extraordinary delay was an "embarrassment" for the Commission.[30]

Small wonder. During this unprecedented delay between the supposed "vote" by the five commissioners and the issuance of the official decision containing new regulations, the already economically depressed telecommunications industry remained mostly frozen in place. Companies that said they would invest in new broadband facilities if the rules eliminating the existing network sharing mandates were eliminated, were left waiting a half-year for the Commission to act.[31]

It is widely known that the five commissioners engaged in fierce squabbling to try to agree on an official written decision.[32] Indeed, the inability of the commissioners to bring their internal deliberations to closure within a reasonable time raises the implication that at least some of the commissioners did not know what issues they were voting on during the February meeting. In addition, the 500-plus page, single-spaced text of the final order contains inconsistencies in the application of the statutory legal standard concerning facilities-sharing that rendered the entire order subject to judicial reversal.[33]

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28. *See* United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (reversing the FCC's decision).

29. *See Review, supra* note 24.

30. *See Powell Sees UNE Order Released This Week*, COMM. DAILY, Aug. 19, 2003 (reporting that "Powell said he was 'embarrassed' that the order was so late in coming since the Commission approved it almost six months ago").

31. There was a great deal of discussion during the interim between the FCC's putative action in February 2003 and the release of its official decision in August 2003 about the impact of the commission's action on investment decisions. See for example, an article in the July 21, 2003 edition of the Boston Herald, reporting that:

> Verizon, BellSouth, and SBC Communications are already taking preliminary steps to jump into the fiber-optic broadband market, based on the FCC's pronouncement earlier this year that it intends to give the dominant local phone companies more latitude to invest in high-capacity infrastructure. But the FCC has yet to release the fine-print version of its latest move to deregulate the telecommunications industry—and it's that devil-in-the-details report that has phone and cable TV service providers on edge.

Jay Fitzgerald, *Fiber-Optic Future Down to the Wire*, BOSTON HERALD, July 21, 2003, at 25.

32. *See* Christopher Stern, *FCC Releases New Phone, Broadband Rules*, WASHINGTON POST, Aug. 22, 2003, at E5 ("After six months of bitter internal debate, the Federal Communications Commission released new rules yesterday . . . ."); *see also* Christopher Stern, *Bitter Atmosphere Envelops FCC*, WASHINGTON POST, June 3, 2003, at E1 ("Yesterday's decision by the Federal Communications Commission marks the second time this year that the agency's five commissioners have ended a long and fierce debate with a split vote, underscoring the sometimes bitter atmosphere at the agency . . . .").

33. *See* United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, AT&T Corp. v. United States Telecom Ass'n, 2004 U.S. Lexis 6711 (U.S., October 12, 2004) (demonstrating, somewhat predictably, a substantial part of the *Triennial Review*

In the Commission's modern history, there never has been an occasion, and certainly not with respect to any matter as important as reforming the facilities-sharing rules, when the agency has taken six months to issue its official order after voting at a public meeting. The sense of ineffectiveness at the muddled mess of the *Triennial Review* proceeding was exacerbated greatly by the fact that the Commission's previous attempts to write sharing rules were each met with judicial reversals on the very same basis—that the regulations unlawfully required excessive access by competitors to the incumbents' facilities.[34] Therefore, the agency has never had in place lawful sharing regulations, even though the 1996 Telecommunications Act gave the Commission an eight-month deadline to promulgate such rules.[35] (The FCC putatively met that deadline by releasing its first set of unlawful rules on August 1, 1996.)[36]

Moreover, once the *Triennial Review* was released, we learned that the decision to curtail the network sharing requirement for new broadband facilities, in fact, rests significantly on the FCC's prediction that elimination of this regulatory burden will stimulate new investment in advanced facilities.[37] Thus, in the Commission's own estimation, the delay in making the new policy effective and the long period of uncertainty likely will have proved costly to the nation's economy at a time when the telecommunications industry was in severe financial straits.[38]

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order was reversed by a unanimous panel of the D.C. Circuit).

34. *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 387 (1999) (finding that "the FCC did not adequately consider the 'necessary and impair' standards when it gave *blanket access* to these network elements . . ."") (emphasis added); *see also* United States Telecom Ass'n v. FCC, 290 F.3d at 425 ("In the end, then, the entire argument about expanding competition and investment boils down to the Commission's expression of its belief that in this area more unbundling is better.").

35. Indeed, in vacating parts of the FCC's *Triennial Review* sharing rules in March 2004, the D.C. Circuit expressed its exasperation with the Commission. *See* United States Telecom Ass'n v. FCC, 359 F.3d at 595. It stayed its vacatur by only sixty days, stating: "This deadline is appropriate in light of the Commission's failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings." *Id*.

36. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Dockets Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd. 15499, 15616-775 (1996) (Local Competition Order), *aff'd in part and vacated in part sub nom*; Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir.1997); Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir.1997), *aff'd in part and remanded*, AT&T v. Iowa Utils. Bd., 525 U.S. 366 (1999).

37. *See Review*, *supra* note 24, ¶¶ 5-6 ("This order . . . seeks to ensure that investment in telecommunications infrastructure will generate substantial, long-term benefits for all consumers.").

38. *Id.* ¶ 6 ("[W]e believe that the certainty we bring today will help stabilize the telecommunications industry, yield renewed investment in telecommunications networks, and increase sustainable competition in all telecommunications markets for the benefit of American consumers."); *see also id.* ¶ 272 (noting that "with the certainty that their fiber optic and packet-based networks will remain free of unbundling requirements, incumbent LECs will have the opportunity to expand their deployment of these networks, enter new

In December 2000, less than two months before he was named the agency's chairman, then-Commissioner Michael Powell acknowledged what was self-evident, even then, declaring that the agency's "bureaucratic process is too slow to respond to the challenges of Internet time."[39] To its own embarrassment and to the detriment of a communications industry in need of timely action, in the *Triennial Review* rulemaking, the Commission's clock ran on horse-and-buggy, rather than Internet time. Certainly, one of the presumed attributes and supposed benefits of expertise is the ability not only to render sound decisions, but also to do so in a timely fashion.

The second example from 2003 of conduct bearing on the conception of the FCC as a tribunal whose decisions rest on specialized expertise involves external activity targeted at the FCC. In June 2003, in its *Media Ownership* proceeding, the Commission modestly relaxed its decades-old rules governing the number and types of media outlets that a single entity may own.[40] These regulations, for example, concern the number of local radio and television stations that one entity may own, whether a single entity may own a newspaper and broadcast station in the same market, the number of local television stations that may be owned by a national television network, and the like.[41] The Commission acted in response to a provision in the 1996 Act directing it to review the media ownership rules every two years and to "repeal or modify any regulation it determines to be no longer in the public interest."[42]

The ownership restrictions are justified only if they are necessary to ensure the American public has available a diversity of information sources. In light of the changes in the media marketplace since the rules were adopted (not the least of which has been the rise of cable, satellite television, and the Internet), the Commission should have been more deregulatory. But once again putting aside the merits of the matter, what warrants consideration in this instance are the novel tactics employed by

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lines of business, and reap the rewards of delivering broadband services to the mass market").

39. Michael Powell, *The Great Digital Broadband Migration*, in COMMUNICATIONS DEREGULATION AND FCC REFORM 18 (Jeffrey A. Eisenach and Randolph J. May ed., 2001).

40. Report and Order and Notice of Proposed Rulemaking, *In the Matter of 2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620 (2003), *aff'd in part and remanded in part,* Prometheus Radio Project v. FCC, 373 F.3d 372 (2004) [hereinafter Media Ownership proceeding].

41. *See Prometheus Radio Project*, 373 F.d at 372 (providing a full description of the FCC rules at issue in the *Media Ownership* proceeding and the agency's rationale for its actions); *see also In the Matter of 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620 (2003), *aff'd in part and remanded in part.*

42. 1996 Act, *supra* note 1, § 202 (h), 110 Stat at 111-12 .

the opponents of ownership rule relaxation. They mounted an unprecedented organized mass e-mail, post card, and call-in campaign urging the FCC not to relax its rules. In the last few weeks before its decision, the FCC was bombarded with approximately 750,000 e-mails,[43] nearly all brief form messages containing almost nothing of evidentiary substance relevant to the state of media competition.[44] On the day of the vote, protesters erupted in shouts inside the Commission's meeting room, while sign-waving picketers marched and chanted outside agency headquarters.[45]

In a democracy, the importance of citizens having access to diverse sources of information cannot be overestimated. It is appropriate, indeed desirable, for the American people to debate media ownership policy and to make their views known to those who set policy. The Commission, of course, published notice of its proposed rule changes in the *Federal Register* and solicited public input in official comment rounds.[46]

But when the FCC is urged to formulate policy based on the number of e-mails or phone calls it receives and the number of picketers marching, as it was urged to do by many in the *Media Ownership* proceeding, including commentators at major newspapers,[47] conception of the agency's role is bound to be altered. These electioneering-style tactics are perfectly appropriate in efforts to influence legislative battles, for example, the battle in Congress to overturn the same FCC's rules at issue in the *Media Ownership* proceeding.[48] But they are not necessarily consistent with the

43. William Safire, *Regulate the F.C.C.*, N.Y. TIMES, June 16, 2003, at A19 ("750,000 people sent messages to the F.C.C.").

44. *See* FCC MB Docket No.02-277 (reviewing the FCC's public files reveals that a message submitted multiple times read as follows: "I want rules in place that serve the public, rather than private, interest. I oppose taking a vote that leads to more media concentration. On June 2, I urge you to retain the current ownership rules"). Many other commonly-worded messages submitted multiple times by different people were in the same vein. *Id*.

45. Frank Ahrens, FCC Eases Media Ownership Rules: Party-Line Vote Clears Way for More Consolidation, WASHINGTON POST, June 3, 2003, at A1.

46. 2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 17 F.C.C.R. 18503 (2002) (notice of proposed rulemaking).

47. One of the most consistent inveighers against any change in the ownership rules, citing the number of e-mails received by the agency, was the New York Times's William Safire. *See* Safire, *supra* note 43; *see also* William Safire, *Big Media's Silence*, N.Y. TIMES, June 26, 2003, at A33 ("Over the protests of 750,000 viewers and readers . . . ."); Bob Herbert, C*ozy With the F.C.C.,* N.Y. TIMES, June 5, 2003, at A35 (citing 500,000 comments on the FCC's web site).

48. Although a flurry of lobbying occurred after the FCC's June 2003 action in the *Media Ownership* proceeding, and several different proposals were introduced in Congress to roll back the Commission's liberalization of the media ownership restrictions, as of yet only one has been adopted. *See* H.R. 2673, 108th Cong. § 629 (2004). As part of an omnibus appropriations bill, Congress reduced the level of national audience reach for commonly-owned television stations from 45% to 39%. The previous limit was 35%. *See*

Progressive-era ideal of administrative deliberation informed more by substantive agency expertise than political considerations.

III. TIME TO CONSIDER AGENCY REFORM

The FCC's fierce internal bickering and unprecedented delay in issuing a decision in the *Triennial Review* proceeding after purporting to vote at the public meeting, and the resort to novel (novel for the FCC and relatively unprecedented with respect to other agencies as well)[49] mass participation tactics designed to influence the agency's *Media Ownership* decision, provides an impetus for thinking critically about reform for the Commission. This is especially true with the marketplace and technological dynamism alone, suggesting a need to reexamine the FCC's mission and structure.

At the signing ceremony for the 1996 Telecommunications Act, then-President Bill Clinton called the Act "truly revolutionary legislation," and proclaimed that "with a stroke of a pen, our laws will catch up with our future. We will help to create an open marketplace where competition and innovation can move as quick as light."[50] In 1998, then-Commissioner, now FCC Chairman, Michael Powell echoed President Clinton's radical rhetoric in the opening sentences of an essay on the need for a new approach to communications policy: "We are in the throes of a revolution. This statement is not intended to be melodramatic, but rather descriptive of the breathtaking moment in which we in the communications field find ourselves."[51]

Significantly, there have been calls by each of the Commission's post-1996 Act chairmen for internal staff reorganizations to better match the mission of the FCC's various bureaus and offices with the increasingly competitive, converging communications environment.[52] Indeed, some

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id.

49. The only other instance that comes to mind of comparable mass participation in a rulemaking context is the Food and Drug Administration's proposed regulations restricting the sale and distribution of cigarettes. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396, 44418 (Aug. 28, 1996) (codified at 21 C.F.R. pt. 801, et al). The FDA reported that the proposed rules generated more than 700,000 pieces of mail between August 1995 and January 1996. *Id.* According to the agency, "[m]ost of the submissions were form letters or post cards." *Id.*

50. Remarks by the President in the Signing Ceremony for the Telecommunications Act Conference Report, 32 WEEKLY COMP. PRES. DOC. 215-16 (Feb. 8, 1996).

51. Michael K. Powell, *Communications Policy Leadership for the Next Century*, 50 FED. COMM. L. J. 529, 529 (1998).

52. *See* REED E. HUNDT, YOU SAY YOU WANT A REVOLUTION: A STORY OF INFORMATION AGE POLITICS 98 (2000) ("Trim down and beef up the FCC: we would privatize many functions and provide expertise appropriate to create competition in formerly monopolized markets. The net result would be a much different agency but one about the same size as the year before."). Chairman Hundt here is relating his thoughts for making a

presumably well-intentioned, common sense tinkering has occurred, resulting in the reorganization and restructuring of some of the Commission's internal offices. For example, the previously separate Cable Bureau (which regulated cable television) and Mass Media Bureau (which regulated broadcast stations) have been merged into a single new Media Bureau with responsibility for regulating both cable and broadcast outlets.[53] There continue to be recurring office shuffles, complete with new office names and organizational titles, supposedly, in response to changes in the industry landscape.[54]

It is time to consider whether more needs to be done than simply further reshuffling of the Commission's internal staff offices. When FCC Chairman William Kennard announced his strategic plan, "A New FCC for the 21st Century," to Congress in August 1999, he boldly proclaimed:

> In *five years*, we expect U.S. communications markets to be characterized predominately by vigorous competition that will greatly reduce the need for direct regulation. The advent of Internet-based and other new technology-driven communications services will continue to erode the traditional regulatory distinctions between different sectors of the communications industry. As a result, over the next five years, the FCC must wisely manage the transition from an industry regulator to market facilitator. *The FCC as we know it today will be very different in both structure and mission*.[55]

Chairman Kennard referred to the agency he had in mind, the one "very

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"much different agency" in anticipation of passage of the 1996 Act. *Id*.; *see also Chairman Kennard Delivers to Congress Draft Strategic Plan for the 21st Century*, DAILY DIGEST (F.C.C., Washington, D.C.), Aug. 12, 1999 ("Our vision is to restructure the agency along the functional lines of enforcement, consumer information, licensing, competition/policy, and international communications. These functional areas will replace the current industry-specific Bureaus and be completed in five years."); *Summary of Testimony of FCC Chairman Michael K. Powell Before the Subcommittee on Commerce, Justice, State and the Judiciary of the Senate Committee on Appropriations*, DAILY DIGEST (F.C.C., Washington, D.C.), June 28, 2001 ("My request for funding is tied to a specific business plan that I present here today . . . organizational restructuring to align our institution with the realities of a dynamic and converging marketplace.").

53. *See FCC Announces Organization of New Media Bureau*, DAILY DIGEST (F.C.C., Washington, D.C.), Mar. 8, 2002 (announcing changes to the organization structure). This makes sense when broadcast and cable television compete in the same mass media marketplace and when, like other communications services in an increasingly digital environment, they are converging. *Id.*

54. *See, e.g.*, *Federal Communications Commission's Common Carrier Bureau Reorganized Along Functional Lines: Common Carrier Bureau Is Renamed Wireline Competition Bureau*, DAILY DIGEST (F.C.C., Washington, D.C.), March 8, 2002; *FCC Chairman Michael Powell Announces Office of Strategic Planning and Policy Analysis; Names Jane Mago Chief*, DAILY DIGEST (F.C.C., Washington, D.C.), Feb. 7, 2003 (indicating the reorganization of the FCC).

55. Strategic Plan: A New FCC for the 21st Century, Aug. 1999, at 1 (emphasis added), *available at* http://www.cclab.com/cclnews/OnlineNews19991018/draft_strategic_plan.pdf; *accord Chairman Kennard Delivers to Congress Draft Strategic Plan for the 21st Century*, *supra* at note 52.

different in both structure and mission," as a "model agency for the digital age."[56] Chairman Kennard's prediction that Internet-based and new technology-driven services would create vigorous marketplace competition, and continue to erode the rationality of traditional regulatory distinctions services, has come to pass.[57] Nevertheless, five years later—and eight years after President Clinton proclaimed the 1996 Act "truly revolutionary legislation,"[58] and despite the renaming of offices and shuffling of titles—the FCC is little different today than it was then in terms of its size, structure, and mission.

The unusual turmoil at the FCC and heightened interest in its regulatory activities during 2003 ought to be a spur, building on the earlier calls for institutional agency reform, for thinking boldly about a slimmer FCC, one appropriate to the down-sized mission foreseen by Chairman Kennard in 1999.[59] My purpose here is not to address in detail what the reformed

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56. Strategic Plan: A New FCC for the 21st Century, *supra* note 55; *accord Chairman Kennard Delivers to Congress Draft Strategic Plan for the 21st Century*, *supra* note 52.

57. *See, e.g.*, Walter S. Mossberg, *Vonage Makes Phoning Through the Internet Convenient and Cheap*, WALL ST. J., Feb. 26, 2004, at B1; Randolph J. May, *The Metaphysics of VoIP*, CNET, *at* http://news.com.com/2010-7352_3-5134896.html (Jan. 5, 2004); Peter Grant & Almar Latour, *Battered Telecoms Face New Challenge: Internet Calling*, Oct. 9, 2003, at A1; Peter Grant, *Comcast Is to Expand Trials of Web-Based Phone Service*, WALL ST. J., Oct. 9, 2003, at B10 (exemplifying the growing use of Internet phone calling).

58. *See* Remarks by the President in the Signing Ceremony for the Telecommunications Act Conference Report, *supra* note 50, at 215.

59. There are hundreds of specific regulatory tasks that no longer need to be performed when the FCC is transformed from an "industry regulator" to, in Chairman Kennard's words, a "market facilitator," and the elimination of these traditional regulatory tasks necessarily implies a more compact agency. *See* Strategic Plan: A New FCC for the 21st Century, *supra* note 55. Despite some halting deregulatory efforts over the past several years, the FCC still has a full-time equivalent employee count of approximately 2000, in the same range it had five years ago when Chairman Kennard offered his strategic plan. *Testimony of Michael K. Powell, Chairman, FCC, Before the Subcommittee on Commerce, Justice, State, and the Judiciary of the Committee on Appropriations U.S. House of Representatives*, Mar. 31, 2004, at 4, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-245628A2.pdf. It is beyond the scope of this essay to detail all of the current regulatory duties that the FCC no longer should perform. But, as an example of a category of significant recurring agency activity ripe for reform, take the FCC's review of mergers in the context of approving license transfers among telecommunications and media companies. *See* Randolph J. May, *Any Volunteers*, LEGAL TIMES, Mar. 6, 2000, at 62. Much of the agency's review of the Communications Act's public interest standard duplicates the review of the antitrust authorities at the Department of Justice and the Federal Trade Commission. *See* Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 MICH. ST. DCL L. REV. 671, 675. Those agencies are better equipped to perform the competition analyses that should be at the heart of the merger review. *See id.* ("[T]he most sensible way to consider the effects of ownership concentration in media economic markets is to use the [Department of Justice] Merger Guidelines approach. But if the FCC adopts this rational policy it will duplicate the work of the Antitrust Division, which would be a waste of public and private resources. The FCC also has monitored the effects of concentration in the marketplace of ideas. However, as a practical matter, enforcement of the Clayton Act in media economic markets will serve to prevent undue concentration in markets for ideas and information."); *see also* Randolph J. May, *Any Volunteers*, LEGAL TIMES, Mar. 6, 2000, at 62 ("To reduce the burden on

agency should look like or the specific arguments pro and con for competing models. That is a separate and larger project.

Nevertheless, it is clear that in approaching this task, Congress should consider at least two fundamental options: first, whether to reduce the number of commissioners from five to three, or even an agency with a single head; and, second, whether to place the new, slimmer "FCC" within the executive branch, especially if the choice is to adopt a single administrator model. These choices are not necessarily unrelated or mutually exclusive, of course.

Certainly, in an environment in which, as then-President Clinton said in 1996, "competition and innovation can move as quick as light,"[60] and as Chairman Powell said in 2001, the Commission must "respond to the challenges of Internet time,"[61] molding a majority among five commissioners with divergent philosophies necessarily can be time-consuming.[62] Witness the agonizingly slow decisionmaking process in the *Triennial Review* proceeding and other important proceedings; this is particularly the case when the FCC routinely embarks on what almost appear to be consciously cumbersome rulemaking proceedings that place many arguably separable issues up for grabs at the same time.[63]

Also, with a five-member agency, it is more likely that, as a result of compromises made in reaching a majority decision, the resulting order will lack clarity or even be internally contradictory.[64] As explained above, the

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merging companies and eliminate duplication of government resources, the FCC should largely defer to the Justice Department's or the FTC's analysis of the competitive impact of the merger. A Feb. 28 report by the International Competition Report Advisory Committee concludes that these agencies have the staff and expertise to perform this function quite competently.").

60. *See* Remarks by the President in the Signing Ceremony for the Telecommunications Act Conference Report, *supra* note 50, at 216.

61. EISENACH & MAY, *supra* note 39, at 18.

62. *See id*. (discussing the FCC's need to make timelier decisions).

63. *See* Randolph J. May, *VoIP Regulation: A Plea for Procedural Modesty*, CNET, Feb. 3, 2004, *at* http://news.com.com/VoIP+regulation%3A+A+plea+for+procedural+modesty/2010-7352_3-5152699.html. It is not unusual, as was the case with the FCC's rulemaking notices in the all-important *Triennial Review, Wireline Broadband* and *Cable Broadband* proceedings, for the agency to invite comment on literally hundreds of separate questions in each proceeding. *See* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 16 F.C.C.R. 22781 (2001); *see also* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798 (2002); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 17 F.C.C.R. 3019 (2002). Almost three years later, the Commission has yet to render decisions in the latter two important proceedings in which it proposes to establish a regulatory framework for broadband services offered by cable and telephone companies.

64. In *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992), commenting on the FCC's order revising its financial interest and syndication rules, the Court put it this way:

> The impression created is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated . . . . The possibility of resolving a

Progressive-era, New Deal expert agency model assumes a group of dispassionate, almost Solomon-like commissioners.[65] Under this institutional model, which implicitly assumes there is almost always one "right" answer, it may be argued that any reduction in the size of the Commission may lessen the soundness of the agency's decisions by virtue of the loss in collective expertise brought to bear on the issues to be addressed. But, any claimed loss in the ability to reach "better" decisions as a result of meshing the collective wisdom of five commissioners acting collegially, must be weighed in the balance against the efficiency gains realized from a smaller decision-making unit. This might mean a reduction in the size of the Commission from five to three members, or even a government unit headed by a single administrator.

Putting aside the never definitively resolved issue of the constitutionality of "independent" agencies operating outside of the Constitution's tripartite structure,[66] the unusual tumult and decisional delay surrounding 2003's two most prominent FCC proceedings undercuts the idea of an independent agency simply applying its expertise, largely insulated from political forces. Indeed, these occurrences point in the direction of giving serious consideration to moving the slimmed-down version of the FCC into the executive branch. While certain adjudicatory functions, such as contested licensing and adversarial complaint proceedings, would remain insulated from political interference and control,[67] locating the FCC in the executive branch would introduce more political accountability for policymaking determinations upon which there are often, quite appropriately, very divergent regulatory perspective. It would constitute an explicit acknowledgement that for many, if not most, controversial regulatory issues there is not one right answer susceptible to discovery by the "experts," but rather a range of choice guided by policy preferences. Such relocation would provide a locus of responsibility for implementation of communications policy pursuant to ambiguous congressional delegations, and accountability is a positive value in our democratic system.[68]

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conflict in favor of the party with the stronger case, as distinct from throwing up one's hands and splitting the difference, was overlooked.

65. Dean Landis, perhaps the most influential of the exponents of the independent agency model during the New Deal, maintained that "[w]ith the rise of regulation, the need for expertness became dominant." JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23 (Yale University Press 1938).

66. *See generally A Symposium on Administrative Law "The Uneasy Constitutional Status of the Administrative Agencies," supra* note 21; *see also* Breger & Edles, *supra* note 11, at 1155-60; Lessig & Sunstein, *supra* note 21 (discussing the constitutionality of independent agencies).

67. See Breger & Edles, *supra* note 11, at 1202, for a discussion concerning insulation of adjudicatory functions in executive agencies from political interference.

68. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865-66 (1984).

Along with increased political accountability, presidential supervision should lead to decisions that are timelier, more internally coherent, and generally more consistent with other executive branch initiatives.[69] There is a trade-off, of course, between presidential accountability on one hand, and independence from political influence on the other. In addition, the balance to be reasonably struck between accountability and independence may differ depending on the agency's mission, history, prior practice, and the circumstances prevailing at a particular time.[70] But it is not readily apparent to me why, in today's changed communications environment, the values of accountability, timeliness, coherence, and consistency are any less desirable when it comes to communications policymaking than, with respect to energy, environmental, transportation, or trade areas in which policymaking is largely placed in the executive branch. Recall, when the ratemaking and entry gate-keeping functions of transportation industries were mostly eliminated and the Interstate Commerce Commission and the Civil Aeronautics Board abolished, the remaining functions, such as safety regulation and merger approvals, were transferred to the executive branch, albeit with a significant degree of independence intact.[71]

Indeed, a few days before the August 2003 issuance of the controversial *Triennial Review* order, musing about potential institutional reform at the FCC, Chairman Powell stated: "There is no reason you have to do all this policy at an independent regulatory agency."[72] Opining that politics increasingly seems to be a part of the mix in agency decisionmaking, Powell declared, "at some level you can argue that we ought to be in the administration and you ought to pursue the direction of the party that won the presidency in the political process . . . ."[73] According to Powell, there is "a credible argument the agency belongs in the administration, part of the political branch."[74]

At that time, Chairman Powell did not endorse any specific changes for FCC reform. He did, however, explicitly recognize that as part of the

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69. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lessig & Sunstein, *supra* note 21 (discussing the relationship of the presidential direction and control in the administrative state).

70. For example, in my opinion, in light of the immediate and substantial impact on financial markets that their actions may engender, the arguments for maintaining the Federal Reserve Board, the Securities and Exchange Commission, and the Commodity Futures Trading Commission as independent agencies largely insulated from day-to-day political pressures are considerably stronger than the arguments for maintaining the FCC's independence from the president's supervision.

71. See Breger & Edles, *supra* note 11, at 1218-20, for a discussion concerning the transfer of functions surviving the demise of the ICC and CAB to new units within the Department of Transportation.

72. Michael Powell, Remarks at The Progress & Freedom Foundation Aspen Summit, August 18, 2003 (videotape of remarks on file with author).

73. *Id*.

74. *Id*.

executive branch, the agency at least would be more politically accountable to the president in exercising whatever policymaking discretion Congress has delegated. The Progressive-era vision of extra-political, independent bodies deciding policy issues mainly on presumed expertise untainted by political considerations,[75] however well-intentioned, never was entirely realistic. After all, FCC commissioners are appointed by a president with political predilections and must be confirmed by senators with political predilections. In addition, the agency is subject to congressional oversight and budgetary controls by legislators with political predilections. There are virtues in openly acknowledging the gap between the Progressive-era ideal and the practical realities of governance in the modern administrative state. At least with respect to an agency responsible for regulating an industry that has changed so much since its creation, there are virtues in trying to narrow such a gap in the interest of sounder decisionmaking and increased accountability.

CONCLUSION

In an era of rapid technological change that creates new communications and information services that, in turn, drive rapid marketplace changes leading to an increasingly competitive environment, the FCC's task of implementing the agency's policymaking authority delegated by Congress is more important than ever. Indeed, the health of the national economy and the welfare of the nation's consumers are impacted significantly by how well the agency does its job.[76]

In connection with the promised forthcoming congressional review of our communications laws,[77] the FCC's notoriously tumultuous year in 2003 could be a catalyst for serious thinking about substantial structural reforms for the agency, including moving a slimmed-down organization with fewer commissioners, or even a single head, into the executive branch. Meaningful institutional reforms could lead a "new FCC" to reach timelier, more coherent, and more consistent determinations in an arena in which

75. Again, it is important to note I am distinguishing between matters in which the agency appropriately has discretion to make general policy and specific adjudicatory matters. While not eschewing placing decisional responsibility in multimember agencies for purely policymaking functions, Professors Breger and Edles do observe that the consensus-building inherent in the independent multi-member model "has especially drawn favor where the agencies serve as adjudicators, deciding licensing, rate-making, antitrust and similar cases that typically involve the resolution of issues affecting individual rights." Breger & Edles, *supra* note 11, at 1198.

76. Even in 1999, in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999), Justice Scalia characterized the 1996 Act as "legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars." The slice of the economy affected is even larger today.

77. *See, e.g.*, Stern, *supra* note 10, and accompanying text; Buskirk, *supra* note 10, and accompanying text.

fast-paced changes put a premium on speedy, sound decisionmaking. In other words, when Congress gets around to creating, as FCC Chairman William Kennard presaged in his 1999 five-year strategic plan, "a model agency for the digital age," America's citizens will be the real beneficiaries.[78]

78. Professors Breger and Edles, authors of perhaps the most comprehensive and incisive recent study of independent agencies, presumably would not be taken aback by my suggestion, at least regarding the FCC. For near the end of their article, they conclude: "The independent agency form has undergone various structural changes in recent decades, and will probably experience even more changes now that administrative agencies are charged with a 'new paradigm' where 'the goals of regulation have become the promotion of competition and the maximization of consumer choice.'" Breger & Edles, *supra* note 11, at 1235-36 (quoting Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law,* 98 COLUM. L. REV. 1323, 1323 (1998)).

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