

# A Better Agency: Reforming the Federal Communications Commission

Representative Greg P. Walden \*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	386
II.	COST-BENEFIT ANALYSIS .....	389
III.	MERGER REVIEW.....	390
IV.	DUE PROCESS AND THE TIMELY PUBLICATION OF PROPOSED RULES .....	391
V.	DEADLINES FOR ACTION ON PUBLIC FILINGS .....	392
VI.	TRANSPARENCY: PERFORMANCE METRICS AND OPERATING MANUALS .....	393
VII.	INDEPENDENT INSPECTOR GENERAL.....	395
VIII.	CONCLUSION .....	396

---

\* Greg Walden represents the people of Oregon's Second Congressional District, encompassing twenty counties in central, southern, and eastern Oregon, in the United States House of Representatives. Chairman, Subcommittee on Communications and Technology of the House Committee on Energy and Commerce.

## I. INTRODUCTION

When I was a broadcaster in 2003, I filed a petition with the Federal Communications Commission (FCC) to license a couple of translators for our stations in Oregon.<sup>1</sup> While the licensing of a translator is not a trivial matter, it is one that the FCC's Media Bureau should be very familiar with and be able to address in short order. After all, licensing of radio stations is one of the core functions for which the FCC's predecessor agency, the Federal Radio Commission, was created in 1927.<sup>2</sup> The FCC granted my petition in December 2013,<sup>3</sup> approximately ten years after I filed the petition and six years after I sold the stations in 2007.<sup>4</sup>

This story depicts an agency utterly unconcerned with the quotidian yet necessary tasks that serve its constituents. Indeed, the FCC has been criticized on a variety of fronts for its process failures.<sup>5</sup> As former University of Colorado Law School professor Philip Weiser wrote in 2009: “[T]he great weight of opinion is that the FCC *has always* operated in a suboptimal fashion and is in dire need of institutional reform.”<sup>6</sup> Professor Weiser went on to quote former FCC Chairman Reed Hundt, saying “that the agency suffers from a perennial ‘reputation for agency capture by special interests, mind-boggling delay, internal strife, lack of competence, and a dreadful record on judicial review.’”<sup>7</sup> Congress, led by both Democrats and Republicans, has produced numerous reports detailing the FCC's miscarriages and disappointments over

---

1. See *Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station: File No. BNPFT-20030317EDY*, FCC: CDBS, [https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=100649088&formid=349&fac\\_num=155834](https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=100649088&formid=349&fac_num=155834) (last visited Oct. 16, 2016); see also *Application Search Details: File No. BNPFT-20030317EDY*, FCC: CDBS, [http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/app\\_det.pl?Application\\_id=649088](http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/app_det.pl?Application_id=649088) (last visited Oct. 16, 2016).

2. See Radio Act of 1927, 47 U.S.C. § 81 (2012).

3. See *Application Search Details*, *supra* note 1.

4. See BIA Fin. Networks, Deals, BROAD. & CABLE (Feb. 23, 2007, 7:00 PM ET), <http://www.broadcastingcable.com/news/news-articles/deals/81977>. See also Broadcast Actions, *Public Notice*, Report No. 46573, at 6, 9-10, 12 (2007), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-276654A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-276654A1.pdf).

5. See, e.g., Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675 (2009).

6. *Id.* at 677 (emphasis added).

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

the past ten years.<sup>8</sup> The FCC itself has called for its own reform over and over again.<sup>9</sup>

Different critics ascribe different reasons for the agency's failures, but I consistently return to two structural factors that leave the FCC prone to such defects as Chairman Hundt described.<sup>10</sup> The first factor is the public interest standard under which the FCC is required to review mergers and regulate spectrum licenses,<sup>11</sup> and the second is the plenary authority of the Chairman, who, as a member of an independent agency, may not be removed except for cause.<sup>12</sup>

First, allow me to qualify this statement by noting that this is by no means an indictment of the public interest standard. The entire purpose of the government should be to serve the interest of the public. "By the people, for the people"<sup>13</sup> are words that every American child learns and every citizen recognizes as a basic tenet of the American ethos. My concern, however, is that the noble aims of the public interest standard are too easily hijacked and converted to convenient pretexts for political, personal, or other agendas.

As other critics have pointed out, the public interest standard has little definition.<sup>14</sup> Nobel Prize-winning economist Ronald Coase flatly stated that "[t]he phrase ['public interest, convenience, or necessity'] . . . lacks any

---

8. See generally, e.g., STAFF OF H. COMM. ON ENERGY & COMMERCE, 110TH CONG., DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J. MARTIN (2008) (majority staff report); STAFF OF S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 114TH CONG., REGULATING THE INTERNET: HOW THE WHITE HOUSE BOWLED OVER FCC INDEPENDENCE (2016). See also, e.g., U.S GOV'T ACCOUNTABILITY OFF., GAO-10-249, INFORMATION COLLECTION AND MANAGEMENT AT THE FEDERAL COMMUNICATIONS COMMISSION (2010), <http://www.gao.gov/assets/310/300545.pdf>; U.S GOV'T ACCOUNTABILITY OFF., GAO-10-79, IMPROVEMENTS NEEDED IN COMMUNICATION, DECISION-MAKING PROCESSES, AND WORKFORCE PLANNING (2010), <http://www.gao.gov/assets/300/299578.pdf>; U.S GOV'T ACCOUNTABILITY OFF., GAO-08-125, FCC HAS MADE SOME PROGRESS IN THE MANAGEMENT OF ITS ENFORCEMENT PROGRAM BUT FACES LIMITATIONS, AND ADDITIONAL ACTIONS ARE NEEDED (2008), <http://www.gao.gov/assets/280/272397.pdf>; U.S GOV'T ACCOUNTABILITY OFF., GAO-07-1046, FCC SHOULD TAKE STEPS TO ENSURE EQUAL ACCESS TO RULEMAKING INFORMATION (2007), <http://www.gao.gov/assets/270/266205.pdf>.

9. See Letter from Robert M. McDowell, Comm'r, FCC to Julius Genachowski, Chairman, FCC (Jul. 20, 2009), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-292122A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-292122A1.pdf); Letter from Robert M. McDowell, Comm'r, FCC to Michael J. Copps, Acting Chairman, FCC (Jan. 27, 2009), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-288104A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-288104A1.pdf); News Release, Ajit Pai & Michael O'Rielly, Comm'rs, FCC, Joint Statement of Commissioners Ajit Pai and Michael O'Rielly on the Abandonment of Consensus-Based Decision-Making at the FCC (Dec. 18, 2014), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-331140A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-331140A1.pdf).

10. See Weiser, *supra* note 5, at 677 (citing Hundt & Rosston, *supra* note 7, at 31).

11. See 47 U.S.C. §§ 309(a), 310(d) (2012) (invoking the public interest standard for the granting of licenses and the FCC's review of their subsequent transfer).

12. See 47 U.S.C. § 154(c) (2012) (which provides for five-year Commissioner terms after appointment and confirmation).

13. See 7 ABRAHAM LINCOLN, THE WRITINGS OF ABRAHAM LINCOLN 20 (Constitutional ed., G.P. Putnam's Sons 1905).

14. See, e.g., Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 8 (1959).

definite meaning.<sup>15</sup> Furthermore, the many inconsistencies in FCC decisions have made it impossible for the phrase to acquire a definite meaning in the process of regulation.”<sup>16</sup> Even the FCC’s own leadership has pointed out that the public interest standard “is vague to the point of vacuousness, providing neither guidance nor constraint on the agency’s action.”<sup>17</sup> Simply put, those charged with upholding the public interest standard are too easily convinced that their own values are those that are in the public interest.<sup>18</sup>

Such an unfettered mandate requires that the FCC be commanded by disciplined, dispassionate masters, dedicated to serving the public within the bounds of their congressional authorization. Realistically, such people are few and far between. In the hands of an ends-oriented Chairman, the public interest standard is all too malleable and often serves to excuse shortcuts in due process and public participation. Accordingly, I have argued consistently that strong process is the only method by which the FCC can regain its legitimacy and integrity.<sup>19</sup>

Under my term as Chairman of the House Subcommittee on Communications and Technology (the Subcommittee), we have dedicated significant time and effort to reforming the FCC, including moving three different bills through the House of Representatives during the 112th, 113th, and 114th Congresses.<sup>20</sup> Our efforts have been aimed at preventing potential

---

15. *Id.*

16. *Id.* at 8-9.

17. Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 3, 14 (Max D. Paglin ed., 1989).

18. See Adam Thierer, President, Progress & Freedom Found., Testimony before the FCC: Hearing on “Serving the Public Interest in the Digital Era” (Mar. 4, 2010), [http://reboot.fcc.gov/c/document\\_library/get\\_file?uuid=eb0c02c5-b5e3-4cc2-a15e-3843b738acb0&groupId=101236](http://reboot.fcc.gov/c/document_library/get_file?uuid=eb0c02c5-b5e3-4cc2-a15e-3843b738acb0&groupId=101236).

19. See, e.g., *Markup of H.R. 452, H.R. 3309, and H.R. 3310: Hearing Before the Comm. on Energy & Commerce*, 112th Cong. (2012),

<http://archives.republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/20120305/HMKP-112-IF00-MState-W000791-20120305.pdf> (statement of Rep. Greg Walden, Chairman, Subcomm. on Commun. & Tech. of the H. Comm. on Energy & Commerce); *Improving FCC Process: Hearing Before the Subcomm. on Commun. & Tech. of the H. Comm. on Energy & Commerce*, 113th Cong. 3 (2013) (statement of Rep. Greg Walden, Chairman, H. Subcomm. on Commun. & Tech. of the H. Comm. on Energy & Commerce) (“The last thing that we want to do is stifle an industry that is continually growing and innovating. Yet that is exactly what could happen if the FCC is not held to certain standards of decision-making.”); *Markup of Discussion Drafts on FCC Process and Transparency: Hearing Before the Subcomm. on Commun. & Tech. of the H. Comm. on Energy & Commerce*, 114th Cong. (2015),

<https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Markups/CT/20150520/HMKP-114-IF16-MState-W000791-20150520.pdf> (statement of Rep. Greg Walden, Chairman, Subcomm. on Commun. & Tech. of the H. Comm. on Energy & Commerce).

20. See Federal Communications Commission Process Reform Act of 2012, H.R. 3309, 112th Cong. (2012); Federal Communications Commission Process Reform Act of 2014, H.R. 3675, 113th Cong. (2014); Federal Communications Commission Process Reform Act of 2015, H.R. 2583, 114th Cong. (2015).

abuses of the public interest standard under the variety of powers available to the FCC Chairman.<sup>21</sup>

The following sections will briefly consider our specific targets and proposals for FCC process reform, including: (1) requiring a formalized cost-benefit analysis before the adoption of regulations, (2) limiting the FCC's excessive latitude in merger review, (3) providing for greater public access to the text of proposed rules and other documents in advance of voting, (4) imposing concrete deadlines for FCC action on complaints, petitions, and other public filings, (5) establishing greater transparency through the adoption of performance metrics and the provision of operating manuals for various FCC programs and decision-making functions, and (6) installing a truly independent Inspector General at the FCC. Collectively, these proposals represent a significant step in ensuring that the public interest standard is not stretched beyond recognition.

## II. COST-BENEFIT ANALYSIS

One process ripe for reform is the FCC's lack of a formalized cost-benefit analysis before the adoption of regulations.<sup>22</sup> Conducting real economic, cost-benefit analyses would require the FCC to understand how costs are allocated across the communications sectors and where consumers ultimately pay those costs in the marketplace.<sup>23</sup> This type of research would, in turn, allow the FCC to better address the needs of the consumers it protects and reflect the reality of the industries it regulates, particularly small businesses that may be disproportionately affected.

This is not a novel idea. Presidents Ronald Reagan,<sup>24</sup> Bill Clinton,<sup>25</sup> George W. Bush,<sup>26</sup> and Barack Obama,<sup>27</sup> required all of their executive

---

21. See, e.g., H.R. REP. NO. 112-414, at 7 (2012) (noting that the purpose of the act is to require the FCC to be more "transparent and methodical" in its processes); H.R. REP. NO. 113-338, at 6 (noting that the purpose of this act is to increase transparency and efficiency into decision-making processes); H.R. REP. NO. 114-305, at 7 (2015) (same).

22. See Review of the Emergency Alert System, *Order*, 31 FCC Rcd 2414 (2016) (statement of Comm'r. O'Rielly).

23. *Id.*

24. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (in which President Reagan first required agencies to use cost-benefit analyses).

25. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (in which President Clinton ordered executive agencies to "identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action)" and "assess both the costs and the benefits of the intended regulation and recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.").

26. See Exec. Order No. 13,422, 72 Fed. Reg. 2,763 (Jan. 18, 2007) (in which President Bush required each executive agency to "identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action.").

27. Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

agencies to inquire into the real harms and benefits of their proposed rules. President Obama's executive order required, among other things, that every executive agency "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)" and "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."<sup>28</sup> President Obama has further suggested that the regulatory principles applied to executive agencies should apply to independent agencies as well.<sup>29</sup>

While it is true that certain services regulated by the FCC do not lend themselves easily to a purely economic analysis—for example, the value of broadcast news as a public good—it is by no means impossible.<sup>30</sup> The FCC should not shield itself behind its public interest mandate to avoid the hard work of understanding the true impact of its policies. Moreover, while naiveté should not cloud the reality that expert studies are not completely bias-free, expert studies do require discipline and integrity to produce a rigorous examination of the market. The exercise of conducting such an analysis would force the FCC to "show its work" by documenting and sufficiently justifying to its constituents how it arrived at a given policy conclusion.<sup>31</sup> Such a requirement would help to prevent the FCC from arriving at facile, purely anecdotal conclusions as to how its proposed rules would serve the public interest.

### III. MERGER REVIEW

Merger authority is another instance in which the FCC's claim of serving the public interest is particularly pronounced. Under the Communications Act of 1934, the FCC is charged with reviewing transactions involving communications licenses and authorizations to ensure that the transactions are in the public interest.<sup>32</sup> The current general counsel of the FCC has argued that "the 'public interest' standard is not limited to purely economic outcomes,"<sup>33</sup> justifying what appears to be horse-trading and

---

28. *Id.*

29. See Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011). Similarly, President Obama's Jobs Council has recommended that "Congress should require [independent regulatory commissions] to conduct cost-benefit analysis for economically significant regulations," including "regulatory impact analyses, coupled with some form of third-party regulatory review." 2011 PRESIDENT'S COUNCIL ON JOBS & COMPETITIVENESS YEAR-END REP. 1, 45, [http://files.jobs-council.com/files/2012/01/JobsCouncil\\_2011YearEndReport1.pdf](http://files.jobs-council.com/files/2012/01/JobsCouncil_2011YearEndReport1.pdf).

30. See Exec. Order No. 12,866, *supra* note 25.

31. See *generally* Review of the Emergency Alert System, *supra* note 22 (statement of Comm'r O'Rielly).

32. See 47 U.S.C. §§ 214(a), 310(d) (2012).

33. See Jon Sallet, *FCC Transaction Review: Competition and the Public Interest*, FCC BLOG (Aug. 12, 2014, 12:39 PM), <https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest>.

haggling with merger applicants for nongermane merger conditions and “voluntary commitments.”<sup>34</sup>

This practice is highly problematic.<sup>35</sup> For one thing, this type of process allows the FCC to extract policy outcomes without having to vet any proposed rules with the public. Open and transparent rulemakings—not reviews of license and authorization transfers—should be the primary venue for the FCC to effect federal policy. Imposing policy through transaction review shields the actions of the FCC from both judicial review and public scrutiny, as proposed conditions often are unknown to any party other than applicants until shortly before the FCC’s approval order is announced.<sup>36</sup> This practice allows the FCC to “use[] such proceedings to decide issues that are otherwise pending in industry rulemakings—leading to one set of rules for those who have merged and another set of rules for similarly situated parties who have not.”<sup>37</sup>

#### IV. DUE PROCESS AND THE TIMELY PUBLICATION OF PROPOSED RULES

The Subcommittee’s other efforts have focused on the availability of data to the public from the FCC. Because notice and comment are requirements borne of due process principles,<sup>38</sup> the fundamental notion that stakeholders must have a fair opportunity to comment before becoming subject to regulations, the Subcommittee has proposed that the FCC begin each rulemaking by developing a record with a Notice of Inquiry, which would lay out the path of the FCC’s thinking.<sup>39</sup> A Notice of Proposed Rulemaking (NPRM) would follow only after the FCC has a sufficient record to support its conclusion and, presumably, its draft rules.

The Subcommittee has also proposed that the text of such tentative rules be made available in the NPRM itself.<sup>40</sup> During the past decade, the FCC has fallen into the deplorable habit of delineating only a general summary of potential action in NPRMs, without including the specific language of

---

34. See Christopher S. Yoo, *Merger Review by the Federal Communications Commission: Comcast-NBC Universal*, 45 REV. IND. ORG. 295, 311 (2014).

35. *Id.* at 311-32.

36. *Id.* at 310. Because merger conditions are “voluntarily” agreed upon by the parties seeking the merger, they are not likely to be contested by any of the participants. *Id.* at 313. Other stakeholders that may be impacted by the practices imposed in these merger conditions are unable to contest the conditions because they lack standing. Further, the public at large cannot comment on merger conditions because there is no required notice-and-comment period on the proposed merger conditions. *Id.* As a result, merger conditions are a back-door method of imposing certain policy outcomes arguably without due process, leveraging the merging parties’ need to close a transaction in order to obtain a specific outcome.

37. Weiser, *supra* note 5, at 709.

38. See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1786 (2007) (noting the D.C. Circuit’s concern for due process interests in notice-and-comment rulemaking).

39. See H.R. 3309, 112th Cong. § 2(a) (2012) (new proposed § 13(a)(1)(A)).

40. See *id.* (new proposed § 13(a)(1)(B)).

proposed rules.<sup>41</sup> The inclusion of the specific text of proposed rules is “a critical step in facilitating meaningful discussion.”<sup>42</sup> Without the text of the proposed rules, the public is left “with the challenge of guessing what issues are really important,” which “undermines the opportunity for meaningful participation and effective deliberation.”<sup>43</sup> The public deserves an FCC that can commit to “publish[ing] the text of proposed rules sufficiently in advance of Commission meetings for both (i) the public to have a meaningful opportunity to comment and (ii) the Commissioners to have a meaningful opportunity to review such comments.”<sup>44</sup> These measures may slow the ability of the Chairman to move swiftly under the powers granted to him or her in the Communications Act, but the benefit of improving process is a restored confidence in the judgment of the FCC.

## V. DEADLINES FOR ACTION ON PUBLIC FILINGS

The Subcommittee has also sought to impose deadlines for FCC action on the complaints, petitions, and other actions filed at the FCC by the public, which the FCC ostensibly serves.<sup>45</sup> Too often, however, these petitions are left to languish without any indication as to when the FCC intends to take them up.<sup>46</sup> The American public deserves more transparency, and consumers and other stakeholders deserve to know that the FCC will resolve their complaints and petitions in a timely manner no matter the administration. Former FCC Chairman Julius Genachowski noted that “shot clocks may be

---

41. See, e.g., Letter from Frederick Butler, President, Nat’l Ass’n of Regulatory Util. Comm’rs, to Susan Crawford, Visiting Professor, Yale Law Sch., Obama-Biden Transition Team on the FCC (Dec. 12, 2008), <http://pubs.naruc.org/pub/536C7D1C-2354-D714-51E7-152898B0C987> (“The FCC frequently releases vague Notices of Proposed Rulemaking that fail to articulate proposed rules and read more like Notices of Inquiry by posing countless open-ended questions.”).

42. MICHAEL WEINBERG & GIGI B. SOHN, AN FCC FOR THE INTERNET AGE: RECOMMENDATIONS FOR REFORMING THE FEDERAL COMMUNICATIONS COMMISSION 4 (2010), [https://www.publicknowledge.org/assets/uploads/blog/fcc-reform-report-card-details-03052010\\_0.pdf](https://www.publicknowledge.org/assets/uploads/blog/fcc-reform-report-card-details-03052010_0.pdf).

43. PHILIP J. WEISER, FCC REFORM AND THE FUTURE OF TELECOMMUNICATIONS POLICY 16-17 (2009), <https://web.archive.org/web/20130129162418/http://fcc-reform.org/f/ccref/weiser-20090105.pdf>.

44. Letter from John D. Dingell, Chairman, H. Comm. on Energy & Commerce, to Kevin J. Martin, Chairman, FCC (Dec. 3, 2007) (on file with author).

45. See Federal Communications Commission Process Reform Act of 2015, H.R. 2583, 114th Cong. § 13(a)(2)(E) (2015).

46. See, e.g., Fifty-Five Unopposed Petitions for Determination of Effective Competition, *Memorandum Opinion and Order*, 29 FCC Rcd 3140 (2014) (closing out *unopposed* petitions for determination of effective competition, some of which had been filed in early December of 2011); see also 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Further Notice of Proposed Rulemaking and Order*, 29 FCC Rcd 4371 (2014). The Commission did not complete the 2010 Quadrennial Review, as statutorily required. Instead, it decided that it would incorporate the 2010 Review into the 2014 Quadrennial Review without producing a separate report. Similarly, the Commission failed to complete Video Competition Reports.



an effective tool” for giving parties and the public a sense of when resolution would come on an issue.<sup>47</sup> Former FCC Commissioners Michael Copps and Robert McDowell also supported the adoption of additional shot clocks.<sup>48</sup> Moreover, shot clocks have been demonstrably effective at the FCC. During Chairman Genachowski’s tenure, the FCC resolved 78% of petitions for reconsideration it received,<sup>49</sup> which are subject to a ninety-day deadline under Section 405 of the Communications Act.<sup>50</sup>

## VI. TRANSPARENCY: PERFORMANCE METRICS AND OPERATING MANUALS

Transparency in government shores up the public’s faith in the fundamental fairness of the government’s allocation of resources.<sup>51</sup> Here, too, the FCC has fallen short, and our process reform bills have sought to remedy those failures.<sup>52</sup> In particular, the Subcommittee has proposed program metrics for some of the FCC’s largest programs.<sup>53</sup> The Government Performance Results Act of 1993 already requires the FCC and other agencies to identify yearly performance goals for all items on the federal budget.<sup>54</sup> Despite this requirement, the Government Accountability Office (GAO) has repeatedly cited the FCC for failing to establish objective, quantifiable performance measures for the various programs within the Universal Service Fund.<sup>55</sup> The Subcommittee have also sought to require the FCC to measure its own effectiveness in promulgating rules, enforcing regulations, and

---

47. *FCC Process Reform: Hearing Before the Subcomm. on Commun. & Tech. of the H. Comm. on Energy & Commerce*, 112th Cong. 88 (May 13, 2011).

48. *Id.*

49. See STAFF OF H. COMM. ON ENERGY & COMMERCE, 112TH CONG., STAFF REPORT ON THE WORKLOAD OF THE FEDERAL COMMUNICATIONS COMMISSION 1-2 (2011), <https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/20111115FCC.pdf>.

50. See 47 U.S.C. § 405(a) (2012).

51. See generally CHRISTOPHER HOOD, TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? 3-20 (2006).

52. See, e.g., H.R. REP. NO. 114-305, at 7-8 (2015).

53. See *id.* at 22.

54. See Government Performance Results Act of 1993 § 4, 31 U.S.C. § 1115 (2012).

55. See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-11, IMPROVED MANAGEMENT CAN ENHANCE FCC DECISION MAKING FOR THE UNIVERSAL SERVICE FUND LOW-INCOME PROGRAM (2010), <http://www.gao.gov/assets/320/312708.pdf> (finding that the FCC took limited steps to develop performance goals and measures for its Low-Income Program); U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-253, LONG-TERM STRATEGIC VISION WOULD HELP ENSURE TARGETING OF E-RATE FUNDS TO HIGHEST-PRIORITY USES (2009), <http://www.gao.gov/assets/290/287867.pdf> (finding no performance goals and inadequate performance measures for the FCC’s E-Rate program); U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-633, FCC NEEDS TO IMPROVE PERFORMANCE MANAGEMENT AND STRENGTHEN OVERSIGHT OF THE HIGH-COST PROGRAM (2008), <http://www.gao.gov/assets/280/276640.pdf> (finding that the FCC had not established performance goals and measures for the high-cost program); U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-151, GREATER INVOLVEMENT NEEDED BY FCC IN THE MANAGEMENT AND OVERSIGHT OF THE E-RATE PROGRAM (2005), (finding that the FCC had not developed useful performance goals and measures for the E-rate program).

promoting the public interest.<sup>56</sup> The process reform bills proposed in our Subcommittee would seek to impose some measure of rigor on the FCC's management of these critical programs.<sup>57</sup>

The FCC's most critical transparency failures have occurred with respect to its internal operations. As "CEO" of the FCC, the Chairman dictates procedures for carrying out FCC business.<sup>58</sup> The Chairman also manages the staff of the entire agency (other than personnel in the offices of fellow Commissioners), including the General Counsel and the Inspector General.<sup>59</sup> Additionally, he or she determines which policy matters will be considered and when they will be considered, and controls the availability of information to the public and to other Commissioners.<sup>60</sup> Despite this plenary power, one would imagine that a functioning agency would set out procedures for managing its internal operations (e.g., when votes are expected, when items are placed on delegated authority, how to provide input to staff, etc.). As any adult might imagine, working in a place without rules and expected procedures would reduce morale and efficiency.

Nonetheless, the FCC has been unable or unwilling to produce standard operating manuals for its basic decision-making functions.<sup>61</sup> As a result, there is little evidence to believe that the Chairman adheres to procedures for providing information to the offices of other Commissioners for agenda items, as has been recommended by the GAO.<sup>62</sup> Limited information on an agency's procedures impedes the public's ability to determine whether the agency is functioning effectively.<sup>63</sup> Other independent agencies have posted these materials on their websites and make them available to the public.<sup>64</sup> It is unclear why the FCC has failed to do so.

The Subcommittee has also proposed publication of the documents to be voted either on circulation or at an Open Meeting.<sup>65</sup> Without publication, the FCC Chairman—and only the Chairman, absent express written

---

56. See H.R. REP. NO. 114-305, at 3 (2015).

57. See *id.* at 22.

58. See 47 U.S.C. § 155(a) (2012) ("The member of the [FCC] designed by the President as chairman shall be the chief executive officer of the [FCC].").

59. See *id.*

60. See 47 C.F.R. § 19.735-203(a) (2015) ("Except as authorized in writing by the Chairman pursuant to paragraph (b) of this section, or otherwise as authorized by the [FCC] or its rules, nonpublic information shall not be disclosed, directly or indirectly, to any person outside the [FCC].").

61. This occurs despite a personal request for such information in writing. See, e.g., Letter from Fred Upton, Chairman, H. Comm. on Energy & Commerce, et al. to Tom Wheeler, Chairman, FCC (Feb. 18, 2015), <https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Letters/20150218FCC.pdf>.

62. See GAO-10-79, *supra* note 8, at 2.

63. See generally HOOD, *supra* note 51, at 3-23.

64. See, e.g., U.S. NAT'L REG. COMM'N, INTERNAL COMMISSION PROCEDURES (2016), <http://www.nrc.gov/docs/ML1611/ML16111B158.pdf>; *Administrative Staff Manuals*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/foia/foia-resources/ftc-administrative-staff-manuals> (last accessed Sept. 25, 2016).

65. See H.R. 2592, 114th Cong. (2015).

authorization—may release information regarding the draft to the public.<sup>66</sup> Commissioners other than the Chairman are prevented from fully discussing the issues in the document with potentially impacted parties before a vote, because such parties are prohibited from discovering the specifics of a proposal.<sup>67</sup> Among other resultant issues, stakeholders are uncertain as to whether their concerns are addressed, how the changed or new rules will modify their obligations, and whether the FCC’s actions will produce the results desired. More problematically, those with special access to FCC insiders have greater knowledge of the agency’s actions, which, as the GAO has found, gives those stakeholders an advantage in lobbying the FCC.<sup>68</sup> This does not promote informed and open policymaking.

Moreover, publication of documents before a vote is a practice endorsed by experts in administrative law.<sup>69</sup> Other federal agencies already practice this type of transparency, either by providing the proposed text of rules from the outset of the comment period or by releasing the final text of the rules before a final decision.<sup>70</sup> While there is a need to protect the deliberative process and the FCC would not be expected to make its discussions or other considerations public, publication of documents before a vote is desirable to ensure due process for all stakeholders. If a commissioner is unwilling to defend a policy position that he or she has championed in a particular proceeding, that person arguably lacks the qualifications for the position.

## VII. INDEPENDENT INSPECTOR GENERAL

In addition to other requirements for transparency, there should be a truly independent Inspector General at the FCC.<sup>71</sup> The FCC’s Inspector General is somewhat unique in the fact that, unlike comparable public servants, he or she is not confirmed by the Senate and serves at the pleasure

---

66. See 47 C.F.R. § 19.735-203 (2015) (“Except as authorized in writing by the Chairman pursuant to paragraph (b) of this section, or otherwise as authorized by the Commission or its rules, nonpublic information shall not be disclosed, directly or indirectly, to any person outside the Commission.”).

67. See *id.*

68. See GAO-07-1046, *supra* note 8.

69. See ADMIN. CONFERENCE OF THE UNITED STATES, ADMINISTRATIVE CONFERENCE RECOMMENDATION 2014-2: GOVERNMENT IN THE SUNSHINE ACT, <https://www.acus.gov/sites/default/files/documents/Recommendation%202014-2%20%28Sunshine%20Act%29.pdf>.

70. The Federal Energy Regulatory Commission (FERC), which operates at an almost identical size, composition, budget, and statutory basis as the FCC, releases orders on the day of the vote. See *Rulemaking Process, Petition for Rulemaking*, FED. ENERGY REG. COMM’N, <http://www.ferc.gov/resources/processes/flow/rule-petition.asp> (last visited Sept. 25, 2016). The Federal Trade Commission (FTC) releases the actual text of rules before proceeding to a final decision pursuant to the Federal Trade Commission Act. 15 U.S.C § 57a(b)(1) (2012).

71. See H. COMM. ON ENERGY & COMMERCE, 114TH CONG., FCC REAUTHORIZATION ACT OF 2015 DISCUSSION DRAFT, TIT. II (2015), <https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/BILLS-114hr-PIH-FCCReauthorization.pdf>.

of the Chairman.<sup>72</sup> It is hard to imagine that this fact does not influence the Inspector General's decision-making process. Anything that calls into question the integrity and independence of an Inspector General is harmful to the agency and to good government, regardless of whether the underlying fear of misconduct comes to fruition. There should be no question as to whether an outside auditor is able to independently evaluate an agency action or initiate an investigation when needed, without fear of retribution or intimidation from that agency's Chairman. Having an independent watchdog improves the agency's credibility, increases public confidence, and reduces opportunity for mischief at all levels.<sup>73</sup>

### VIII. CONCLUSION

Finally, Congress itself has a job to do as well. As much as the Subcommittee has taken the FCC to task for jurisdictional overreach and failure to complete statutorily required tasks, it is ultimately the job of Congress to reauthorize the FCC every year and ensure its compliance with its enabling statute. The FCC has not been formally reauthorized by Congress since the FCC authorization Act of 1990,<sup>74</sup> although Congress continues to appropriate funds for its activities. While reauthorization is a helpful tool for keeping any agency on track, it lends itself particularly well to the FCC, an agency tasked with regulating an ever-evolving industry. By periodically reviewing the utility of regulations, the agency is forced to take a hard look at its operations and management, and to determine whether it is doing the best possible job for both the industry it regulates and the consumers it protects.

Moreover, the FCC is laboring under a statute that may no longer fit the market.<sup>75</sup> The principles of competition and consumer protection that inform and structure the Communications Act are sound and time-proof. However, the regulatory silos, often created decades ago around various industries, are no longer valid. There is a real need to update the Communications Act for a market of converged services and overlapping competitors, before the FCC stretches the Communications Act and the public interest standard beyond recognition.

---

72. See Inspector General Act of 1978 § 8G(c), 5 U.S.C. App. § 8G(c) (2012).

73. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-117T, INSPECTORS GENERAL: ENHANCING FEDERAL ACCOUNTABILITY (2003), <http://www.gao.gov/assets/120/110419.pdf> (discussing how independent inspectors general have already improved government operations and stating inspectors general can be more effective in the future).

74. Federal Communications Commission Authorization Act of 1990, Pub. L. No. 101-396, 104 Stat. 848.

75. See Trey Hanbury & Deborah Broderson, *USA: Rewriting the U.S. Communications Act for the 21st Century*, HOGAN LOVELLS GLOBAL MEDIA & COMM. Q., Autumn 2014, at 9, <http://www.hoganlovells.com/files/Uploads/Documents/2%20USA%20-%20Rewriting%20the%20U.S.%20Communications%20Act.pdf>.