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WORKING PAPER

**PARADOXES OF MEDIA POLICY ANALYSIS:
IMPLICATIONS FOR PUBLIC INTEREST MEDIA
REGULATION**

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July, 2008

This paper is derived from remarks prepared for the Administrative Law Symposium, "Does Red Lion Still Roar? Exploring Public Interest Media Regulation of Media in Commemoration of the Fortieth Anniversary of Red Lion Broadcasting v. FCC," American University School of Law, Washington, DC.

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Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation

I. Introduction

When the Federal Communications Commission decided in 1987 to eliminate the Fairness Doctrine, the decision arose from the judgment that the Fairness Doctrine was no longer necessary given the changes that had taken place in the media environment and, more important, that the Fairness Doctrine undermined, rather than achieved, its primary policy goal – that of increasing the extent to which broadcasters provided citizens with coverage of controversial issues of public importance.¹ This determination was made in the wake of what the FCC described as a “detailed evaluation as to whether or not the fairness doctrine in operation, enhances or inhibits the presentation of diverse views on public issues.”² This detailed evaluation was the well-known 1985 Fairness Report.³ According to the Commission, prior to the 1985 Fairness Report, the FCC had “never specifically made an empirical assessment as to the efficacy of this chosen regulatory mechanism to promote access by the public to the marketplace of ideas.”⁴ Indeed, in its assessment of the constitutionality of the Fairness Doctrine in 1969, the Supreme Court acknowledged that the possibility of the doctrine causing more harm than good was, “at best speculative.”⁵

The 1985 Fairness Report served as the primary evidentiary source for the FCC in its decision two years later to eliminate the Fairness Doctrine.⁶ This report emerged from a proceeding in which over

¹ Complaint of Syracuse Peace Council against Television Station WTVH, Syracuse, New York, 2 FCC Rcd 5043, 5052 (1987) (“we concluded that, in operation, the fairness doctrine actually thwarts the purpose for which it was designed to achieve. We found that the doctrine inhibits broadcasters, on balance, from covering controversial issues of public importance. As a result, instead of promoting access to diverse opinions on controversial issues of public importance, the actual effect of the doctrine is to ‘overall lessen the flow of diverse viewpoints to the public.’”) (citations omitted).

² Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 158 (1985).

³ Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145 (1985).

⁴ Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 158 (1985).

⁵ *Red Lion Broadcasting v. Federal Communications Commission*, 395 U.S. 367, 393 (1969).

⁶ Complaint of Syracuse Peace Council Against Television Station WTVH, Syracuse, New York, 2 FCC Rcd 5043, paragraphs 42-61 (1987).

100 parties submitted comments.⁷ And it was these comments (particularly those of the NAB, Meredith Broadcasting, and Sinclair Broadcasting) upon which the report relied in formulating its conclusion that the Fairness Doctrine was not serving the public interest. This analytical approach undertaken by the FCC was controversial at the time, with some critics emphasizing that the FCC reached its decision via an over-reliance on anecdotal examples provided by broadcasters and a lack of any systematic statistical analysis.⁸ Nonetheless, the Commission's decision to eliminate the Fairness Doctrine was upheld by the U.S. Court of Appeals for the D.C. Circuit,⁹ with the court endorsing the rigor of the Commission's analytical process,¹⁰ while also granting substantial deference to the Commission's expert judgment on the matter¹¹ Importantly, the court upheld the FCC's decision purely on policy grounds, declining to consider the constitutional issues raised by the Fairness Doctrine.¹²

It is this issue of how policymakers assess public interest media regulations from a policy (rather than a constitutional) standpoint, and the current state of the analytical tools and processes employed to do so, that is the focus of this discussion. This look back at the analytical dynamics surrounding the

⁷ Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 146 (1985) ("More than one hundred parties submitted formal comments and reply comments in this proceeding. Many other persons participated in this proceeding through the submission of informal comments.").

⁸ Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUDIES 279, 299 (1997) ("Within the legislative policy debate, the FCC has been criticized by Congress for its 1985 finding that the FD 'chilled' free speech, precisely on the grounds that it reached such a conclusion lacking any factual or 'statistical' basis.") (citations omitted); Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 180, 185 (1985) ("A number of parties characterize the statements made by broadcasters that document the existence of 'chilling effect' as mere 'self-serving' utterances to which the Commission should accord little probative value... In addition, several supporters of the retention of the fairness doctrine argue that the record in this proceeding provides inadequate support of a 'chilling effect' on the grounds that the NAB, in the appendix to its comments, 'merely' provided 45 examples of the way in which the fairness doctrine chills broadcasters' speech.") (citations omitted); *Syracuse Peace Council v. Federal Communications Commission*, 867 F.2d 654, 662 (1989) ("Several parties, however, have attacked the evidence of broadcaster chill and what they content is the Commission's failure to respond adequately to the attacks.").

⁹ *Syracuse Peace Council v. Federal Communications Commission*, 867 F.2d 654, 673 (1989) ("We conclude that the FCC's decision that the fairness doctrine no longer served the public interest was neither arbitrary, capricious, nor an abuse of discretion.").

¹⁰ *See Syracuse Peace Council v. Federal Communications Commission*, 867 F.2d 654, 660-666 (1989) (analyzing and upholding the evidentiary sources relied upon by the Commission in the 1985 Fairness Report).

¹¹ *Syracuse Peace Council v. Federal Communications Commission*, 867 F.2d 654, 660 (1989) ("The FCC's decision that the fairness doctrine no longer serves the public interest is a policy judgment. . . . In this situation, we owe great deference to the Commission's judgment.").

¹² *Syracuse Peace Council v. Federal Communications Commission*, 867 F.2d 654, 660 (1989) ("...we uphold the Commission without reaching the constitutional issues.").

elimination of the Fairness Doctrine is intended to raise the issue of the nature of the information environment that surrounds the analysis of public interest media regulation. It is the contention of this paper that the promotion of a robust information environment – in which the data necessary to guide well-informed policymaking are being gathered and made widely available, and in which objective research can be conducted and widely disseminated – is an important element of public interest media policymaking, given the dynamics of contemporary policymaking.

When we look back at the FCC’s inquiry into the efficacy of the Fairness Doctrine, the differences between it and the nature of contemporary media policymaking are striking. Today, the analytical environment surrounding media policy is much different. The demand for rigorous, defensible empirical analyses of FCC policies has become more pronounced in virtually all quarters.¹³ The courts, in particular, have become increasingly demanding, exhibiting a decreasing willingness to defer to the Commission’s expert judgment.¹⁴ Congress, via legislation such as the Data Quality Act,¹⁵ has increased the analytical burden upon the FCC. Yet at the same time, the quality, scope, and accessibility of the data necessary to engage in such analyses are in decline,¹⁶ and the policymaking process itself seems to be increasingly politicized.¹⁷ These fundamental paradoxes, and their implications for the future of public interest media regulation, are discussed below.

II. Paradox 1: Evidence Driven Policymaking Meets Information Vacuums

It has been well-documented how the past 40 years have seen a strong turn towards evidence-driven policymaking.¹⁸ This tendency has been particularly pronounced in the realm of media policy,

¹³ See Robert Corn Revere, *Economics and Media Regulation*, in *MEDIA ECONOMICS: THEORY AND PRACTICE* 71, 83 (1993) (describing the FCC’s move away from an “intuitive model” of policymaking and the agency’s “newly discovered interest in the collection of economic data and analysis”); Philip M. Napoli, *The Unique Nature of Communications Regulation: Evidence and Implications for Communications Policy Analysis*, 43 *J. BROAD. & ELEC. MEDIA* 565 (1999) (discussing the implications of this trend for communications policymaking).

¹⁴ See Philip M. Napoli, *The Unique Nature of Communications Regulation: Evidence and Implications for Communications Policy Analysis*, 43 *J. BROAD. & ELEC. MEDIA* 565 (1999).

¹⁵ Data Quality Act § 515, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153 (2000).

¹⁶ See *infra*, notes 21-37 and accompanying text.

¹⁷ See *infra*, notes 38-52 and accompanying text.

¹⁸ DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 6–7 (1997) (describing the “rationality project” that she sees “at the core of American political culture since the beginning.”).

where empirical analysis has increasingly has been used to support decision-making, and where the courts have increasingly demanded that rigorous empirical analyses support any policy decisions brought to their attention.¹⁹

What has received far less attention, however, is how the information environment has evolved during this transition to increasingly evidence-driven policymaking. It would seem logical to presume that the move toward increasingly evidence-driven policymaking would be accompanied by substantial efforts to increase the analytical resources available to policymakers and policy researchers. In the realm of media policymaking, this has not been the case. At best, the information environment has failed to keep pace with the increased analytical demands that are being placed on the FCC. At worst, the information environment has actually degraded at the same time that the demands being placed upon it are increasing.

One problem area has involved the scaling back of data-gathering activities in a wide range of areas. Over the past three decades, the FCC has, among other things, halted the gathering of financial statements from broadcasters,²⁰ ceased gathering cable system subscriber data,²¹ and reduced requirements for broadcaster performance data in connection with the license renewal process.²² Such scaling back often has been associated with the general deregulatory trend, in an effort to alleviate reporting burdens on the regulated industries. Of course, the larger effect (be it intentional or

See also BRUCE BIMBER, *THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT* xi (1996) (noting that the “possibility of isolating objective truths from human values, and the ability to capture what is most important about public life with science, shapes both experts’ attempts to inform policy-making and scholars’ struggles to define methodology for understanding political action.”); Kurt Finsterbusch & Mary R. Hamilton, *The Rationalization of Social Science Research in Policy Studies*, 19 INT’L. J. COMP. SOC. 88, 88 (1978) (“Social scientists are becoming increasingly involved in policy research.”). *See generally* THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* (1991).

¹⁹ *See supra* note 13.

²⁰ James G. Webster, *The Role of Audience Ratings in Communications Policy*, 12 COMM. & L. 59, 63 (1990) (“[T]he FCC stopped collecting financial statements from broadcasters years ago.”).

²¹ John Dunbar, *A Penchant for Secrecy: Why is the FCC So Determined to Keep Key Data from the Public?*, THE CENTER FOR PUBLIC INTEGRITY, May 22, 2003, <http://www.openairwaves.org/telecom/report.aspx?aid=18> (noting that incomplete cable system subscriber data were found in the FCC’s Cable Operations and Licensing System database due to the fact that “the FCC stopped collecting it after the ‘deregulation’ of the industry in 1994”).

²² Radio Broadcast Services: Revision of Applications for Renewal of License and Commercial and Noncommercial AM, FM, and Television Licensees, *Report and Order*, 49 Rad. Reg. 2d (P & F) 740, 741 (Mar. 26, 1981).

unintentional) is to create information vacuums that hamper just the kinds of analyses that have become an increasingly prominent part of contemporary media policymaking.

This paradox was well-illustrated recently in a speech by FCC Commissioner Robert McDowell.²³ McDowell was expressing his opposition to a recent decision by the Commission to reverse the decades-long trend in reducing the amount of information gathered from broadcast licensees by increasing licensee reporting requirements.²⁴ Under the Commission's new rules, licensees will be required to provide, on a quarterly basis, information on a range of programming categories that have historically been linked with serving the public interest. Commissioner McDowell questioned why the Commission would want such information, suggesting that such information would most likely open the door to increased content regulation.²⁵ An alternative, and more valid, answer as to why the Commission would want such information can be found in the FCC's 2002 and 2007 media ownership studies. The Commission's *own efforts* to investigate the question of whether its media ownership regulations serve the public interest included detailed studies of the relationship between media ownership and market characteristics and the provision of exactly the kinds of programming categories articulated in the new reporting requirements.²⁶ And because broadcast licensees have not, until very recently, been required to

²³ Robert M. McDowell, Commissioner, Fed. Comm. Comm'n, Keynote Address at the Quello Communications Law and Policy Symposium (April 23, 2008). Available: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281772A1.pdf.

²⁴ See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, 23 FCC Rcd 1274 (Jan. 24, 2008); Robert M. McDowell, Commissioner, Fed. Comm. Comm'n, Keynote Address at the Quello Communications Law and Policy Symposium (April 23, 2008), at 4 ("I cast a dissenting vote against this new form."). Available: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281772A1.pdf.

²⁵ Robert M. McDowell, Commissioner, Fed. Comm. Comm'n, Keynote Address at the Quello Communications Law and Policy Symposium (April 23, 2008), at 5 ("I also question the need for government to use the new Form 355 to foist upon local stations its preferences regarding categories of programming. Although the Commission has not mandated certain types of programming, we are regulating with a wink and nod by requiring lists of such programming. Why does the FCC need a list of the religious programming aired on a station? Why do we require a list of all civic affairs programming? Why do we need to know whether it was locally produced or part of a regularly scheduled program?"). Available: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281772A1.pdf.

²⁶ See THOMAS C. SPAVINS, LORETTA DENISON, SCOTT ROBERTS & JANE FRENETTE, THE MEASUREMENT OF LOCAL TELEVISION NEWS AND PUBLIC AFFAIRS PROGRAMS: FCC MEDIA OWNERSHIP STUDY # 7 (2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.pdf. For more recent research on this topic, see GREGORY S. CRAWFORD, TELEVISION STATION OWNERSHIP STRUCTURE AND THE QUANTITY AND QUALITY OF TV PROGRAMMING: FCC MEDIA OWNERSHIP STUDY #3, at 2-4 (2007), available at http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A4.pdf (examining the relationship between ownership structure and the provision of news and public affairs programming); DANIEL SHIMAN, KENNETH LYNCH, CRAIG STROUP & PEDRO ALMOGUERA, NEWS OPERATIONS: FCC MEDIA OWNERSHIP STUDY #4, at

report such information, the Commission's studies were crippled by inadequate data.²⁷ The Commission engages in studies of this type to meet the analytical standards that have been placed on it by Congress and the courts. To refrain from gathering the type of data necessary to meet this analytical standard is, to say the least, paradoxical.

A second related problem (that in many ways arises from the first) involves policymakers' increased reliance on commercial data sources. Essentially, various areas of data gathering have been "outsourced" to commercial firms.²⁸ The policy-specific concerns that arise from this are: 1) that the access terms and provisions associated with commercial databases often are too restrictive to facilitate an open and transparent policymaking process; and 2) that the data often are gathered with the needs of commercial clients in mind, rather than the needs of policymakers and policy researchers.

Considering the first concern, we have seen in recent years an increasing number of controversies surrounding the issue of the accessibility of the data that underlie a wide range of media policy decisions. While it would seem axiomatic that public policy should be made with publicly available data, the restrictive access terms associated with most commercial databases often mean that this is not the case.²⁹ Most recently on this front, Georgetown University's Institute for Public Representation has been struggling to gain public access to a wide range of commercial data sources used in FCC analyses related to the Commission's localism proceeding.³⁰

IV-5 (2007), available at http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A5.pdf. (examining the relationship between television and radio station ownership and market structures and the provision of news and public affairs programming).

²⁷ See Philip M. Napoli and Joe Karaganis, *Toward a Federal Data Agenda for Communications Policymaking*, 16 *COMMLAW CONSP.* 53, 72-75 (2007) (Reviewing the shortcomings of the FCC's media ownership studies.).

²⁸ See generally Philip M. Napoli and Michelle Seaton, *Necessary Knowledge for Communications Policymaking: Information Asymmetries and Commercial Data Access and Usage in the Policymaking Process*, 59 *FED. COMM. L.J.* 295 (reviewing the increased reliance of communications policymakers on commercial data sources).

²⁹ Philip M. Napoli and Michelle Seaton, *Necessary Knowledge for Communications Policymaking: Information Asymmetries and Commercial Data Access and Usage in the Policymaking Process*, 59 *FED. COMM. L.J.* 295, 309 ("As the data move to private hands, researchers increasingly find themselves at the mercy of the often prohibitive pricing platforms and often very restrictive licensing conditions of the commercial data providers.").

³⁰ *Institute for Public Representation v. Federal Communications Commission*, Complaint for Declaratory and Injunctive Relief, United States District Court for the District of Columbia (Nov. 16, 2007). Available: http://www.freepress.net/files/ipr_foia_complaint.pdf.

Considering the second concern, the key issue here is that data gathered for the commercial market are not necessarily gathered or organized in ways that best meet the needs of policymakers and policy researchers. For instance, many commercial data sources have gaps in their coverage of media markets or media outlets that are particularly pronounced in relation to minority owned/targeted media outlets or minority audiences.³¹

This issue rose to prominence recently within the context of the FCC's efforts to determine the extent of cable penetration in the U.S., in conjunction with its annual report on competition in the video programming market. An early draft of the competition report was reported³² to rely upon data from Warren Communications (a commercial publisher of media industry data) in determining that national cable penetration had met the 70 percent threshold that triggers certain greater FCC regulatory authority over the industry.³³ These data contradicted other commercial data sources, which demonstrated penetration levels in the 60 percent range.³⁴ More important, Warren Communications responded to the controversy by contending that its data weren't well-suited to determining whether the threshold had been met.³⁵ The issue has triggered a debate over the current state of cable penetration in the U.S. and the validity of the different commercial data sources available for making such a determination.³⁶ Perhaps

³¹ See Philip M. Napoli and Michelle Seaton, *Necessary Knowledge for Communications Policymaking: Information Asymmetries and Commercial Data Access and Usage in the Policymaking Process*, 59 FED. COMM. L.J. 295, 325 (discussing gaps in BIA and Arbitron data in relation to minority media markets and foreign language media outlets).

³² Jonathan Make, *November FCC Meeting to Focus on Cable Industry*, COMMUNICATIONS DAILY (Nov. 14, 2007).

³³ See Cable Communications Policy Act of 1984, Public Law 98-549, 98 STAT.2780, 47.U.S.C. 532, SEC.612(g). The "70/70 rule" states that if the Commission finds that cable service is available to 70% of households and 70% of those homes subscribe, then the FCC can "promulgate any additional rule necessary to provide diversity of information sources."

³⁴ Kyle E. McSarrow, President and CEO, National Cable & Telecommunications Association. Letter to FCC Chairman Kevin J. Martin (November 14, 2007), on file with author ("Noting cable penetration of 58.1 percent according to SNL Kagan data, and cable penetration of 61.1 percent according to Nielsen Media Research).

³⁵ Jonathan Make, *November FCC Meeting to Focus on Cable Industry*, COMMUNICATIONS DAILY (Nov. 14, 2007).

³⁶ See, e.g., Harold Feld and Andrew Jay Schwartzman, Media Access Project, Letter to FCC Commissioners Robert M. McDowell and Deborah Taylor Tate (November 16, 2007) (arguing on behalf of the accuracy of the Warren data); Michael G. Baumann, Cable Penetration Rate: A Review of the Warren Communications News Data. Attachment to letter from Daniel L. Brenner, General Counsel, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (November 20, 2007) (arguing against the accuracy of the Warren data); Craig E. Moffett, Vice President, Sanford C. Bernstein & Co., Letter to FCC Commissioner Jonathan Adelstein (November 21, 2007) (arguing against the accuracy of the Warren data).

more important, the competition report remains, as of this writing, in limbo as a result.³⁷ The key here is that commercial databases prepared to meet marketplace needs do not necessarily meet the unique needs that arise from the public interest questions of interest to policymakers and policy researchers.

It is important to emphasize the wide range of reasons behind this overall degradation of the information environment – at least in relation to the nature of the analytical demands that are increasingly placed on policymakers. In some instances, the explanation involves the implementation of a deregulatory philosophy and the inclusion of data gathering and reporting activities within the overall deregulatory agenda. In other cases the situation is perhaps best seen as an issue of resources, as the FCC most likely lacks the necessary resources to engage in the full range of data gathering activities necessary to inform its policymaking, and hence neglects certain data gathering activities, or comes to rely increasingly on third party data providers. The bottom line is that the information environment has not been sufficiently reconfigured to reflect the analytical environment in which media policymakers must operate.

Given that public interest regulations must, in a predominantly deregulatory policy environment, have their benefits rigorously and systematically demonstrated to outweigh their costs in order to survive, an information environment with the tendencies described above toward substantial data gaps represents a particular danger for the future of public interest media regulation. Were the Fairness Doctrine considered by the Supreme Court today, the Court would (unlike in 1969) most likely demand rigorous evidence that it provides the benefits ascribed to it. Unfortunately, the raw data necessary to effectively make such a determination would most likely not be available.

III. Paradox 2: Evidence Driven Policymaking Meets the Politicization of Policy Research

The trend towards evidence-driven policymaking discussed above provides the starting point for the second key paradox of contemporary media policymaking, in which the push for evidence-driven policy decision-making butts up against a policymaking and policy research environment that has grown

³⁷ Barbara Esbin and Adam Thierer, *Where is the FCC's Annual Competition Report?* Progress and Freedom Foundation Progress Snapshot 4.11 (May, 2008).

increasingly politicized. This is not to say that media policymaking has not always been a fundamentally political process. It most definitely has.³⁸ Rather, the point here is that there have been some changes to the dynamics of media policymaking that have made this more so. The first involves the increased growth, diversification, and economic significance of the media and communications sector in the U.S. Simply put, the stakes are higher today than they were in the past, with a broader range of stakeholders having an interest in decision outcomes. The second change (and this is, to some degree, related to the first), involves the extent to which the public pays more attention to media policy issues than they have in the past. As media and communications technologies have become a more integral part of citizens' lives, media policy issues are resonating with, and mobilizing, citizens and public interest groups to a perhaps unprecedented degree.³⁹ This too contributes to a more highly politicized policymaking environment, as what interests the citizenry inevitably attracts more attention from Congress as well.

The pressures on media policymakers are therefore greater and more varied today. And, as a result, we seem to be seeing indications that political strategies and considerations increasingly are manifesting themselves in the information environment surrounding media policymaking. The key concern here is that the analytical process becomes results-driven while maintaining the appearance of being evidence-driven.

Perhaps the most prominent manifestations of this paradox involve recent incidences in which the FCC has been accused of selectively withholding policy relevant research or data. For instance, in the fall of 2006, two unreleased FCC studies pertaining to the Commission's media ownership and localism proceedings – both of which contained conclusions that raised questions about the appropriateness of relaxing certain media ownership regulations – were leaked to Senator Barbara Boxer.⁴⁰ This led to widespread speculation and criticism that the FCC was attempting to manipulate the analytical process in

³⁸ See generally, ERWIN G. KRASNOW, LAWRENCE D. LONGLEY, AND HERBERT A. TERRY, *THE POLITICS OF BROADCAST REGULATION* (1982).

³⁹ See generally Philip M. Napoli, *Public Interest Media Advocacy and Activism as a Social Movement*, 33 COMM. YEARBOOK xx (in press).

⁴⁰ Senator Barbara Boxer, Letter to FCC Chairman Kevin J. Martin (September 16, 2006) (“this is the second report in a week that I have received that appears to have been shelved by officials within the FCC and I am growing more and more concerned at these developments.”).

favor of deregulation. This controversy served as the catalyst for an internal investigation by the FCC's Inspector General,⁴¹ and the studies ultimately were released to the public.⁴²

Such criticisms of the FCC intensified, however, upon the subsequent release of a paper authored by the FCC's then-Chief Economist that was described by the author as "an attempt to share some thoughts and ideas I have about how the FCC can approach relaxing newspaper-broadcast cross-ownership restrictions."⁴³ In terms of relevant research, the paper outlines "some studies that might provide valuable inputs to support a relaxation of newspaper-broadcast ownership limits."⁴⁴ Obviously, statements such as these raised concerns that, within the FCC, results-driven policymaking may be operating under the guise of evidence-driven policymaking, and that policy research was being employed more for political purposes than for analytical purposes.

More recently, in a decision involving the question of possible broadcast signal interference arising from the operation of a new "broadband over power line" service,⁴⁵ the Commission initially refused to release five studies that it had relied upon in reaching its conclusions, and only later (after two FOIA requests) released the five studies with substantial portions redacted.⁴⁶ The U.S. Court of Appeals for the D.C. Circuit found these actions central to its decision to remand the decision back to the Commission; the court also required the Commission to make the studies available in unredacted form.⁴⁷ In issuing this decision, the court noted that "It would appear to be a fairly obvious proposition that

⁴¹ Report of Investigation into Allegations that Senior Management Ordered Research Suppressed or Destroyed, Office of the Inspector General, Federal Communications Commission (October 4, 2007).

⁴² Multiple drafts of the previously unreleased studies (*Do Local Owners Deliver More Localism?; Review of the Radio Industry*) can be found at: <http://www.fcc.gov/ownership/additional.html>.

⁴³ Leslie M. Marx, *Summary of Ideas on Newspaper-Broadcast Cross-Ownership* (June 15, 2006), 3. Available: <http://www.fcc.gov/ownership/materials/newly-released/newspaperbroadcast061506.pdf>.

⁴⁴ Leslie M. Marx, *Summary of Ideas on Newspaper-Broadcast Cross-Ownership* (June 15, 2006), 14. Available: <http://www.fcc.gov/ownership/materials/newly-released/newspaperbroadcast061506.pdf>.

⁴⁵ See Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems, Carrier Current Systems, 19 F.C.C.R. 21,265.

⁴⁶ *American Radio Relay League v. Federal Communications Commission*, 524 F.3d 227, 232 (April 25, 2008) ("When the League filed a second FOIA request . . . , the Commission released five studies in redacted form and made them part of the record.")

⁴⁷ *American Radio Relay League v. Federal Communications Commission*, 524 F.3d 227, 240 (April 25, 2008) ("On remand, the Commission shall make available for notice and comment the unredacted 'technical studies and data that it has employed in reaching [its] decisions' and shall make them part of the rulemaking record.") (citations omitted).

studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.”⁴⁸

The process itself via which research is utilized in media policymaking is increasingly being called into question. For instance, the process surrounding the FCC’s selection of researchers for its most recent media ownership studies, and the process of soliciting and incorporating external peer reviews for these studies, have been the subject of congressional inquiry.⁴⁹ A number academic and public interest organization analyses of the process have been similarly critical.⁵⁰ Industry stakeholders also have been critical of an apparent results-driven approach to policy research within the FCC. The NCTA, for instance, issued a report highly critical of the completely contradictory policy recommendations contained within two FCC studies of the a la carte issue,⁵¹ obliquely suggesting that the second report (which supported a la carte) was a purely results-driven effort by the Kevin Martin-led FCC to reverse the policy course undertaken by Martin’s predecessor, Michael Powell.⁵²

It is, of course, naïve to assume that policy research is ever conducted in a purely objective manner and purely devoid of broader political considerations. However, should the credibility of the policy research—policymaking relationship suffer too many hits, then the notion that policymaking has in some way evolved from the more intuitive approach of the past to a more objective, evidence-driven,

⁴⁸ American Radio Relay League v. Federal Communications Commission, 524 F.3d 227, 237 (April 25, 2008)

⁴⁹ Representatives Maurice D. Hinchey, Bart Stupak, Tammy Baldwin, Louise M. Slaughter, and David Price. Letter to FCC Chairman Kevin Martin (September 14, 2007) (expressing concern that the FCC did not reveal how it recruited individuals to conduct its media ownership studies, how peer reviewers were selected, and why peer reviews were not solicited before the publication of the studies).

⁵⁰ See generally, Mark Cooper, *Biased Questions Yield Biased Answers: How the FCC Loaded the Dice in Setting its Media Ownership Research Agenda*, Consumer Federation of America (July 2007); *Junk Science and Administrative Abuse in the Effort of the FCC to Eliminate Limits on Media Concentration*, Paper presented at the annual meeting of the International Communication Association (May, 2008); Colleen Mihal, *Research as Alibi: Analysis of the FCC’s 2006-2007 Media Ownership Studies*, Paper presented at the National Conference for Media Reform (June, 2008).

⁵¹ See Report on the Packaging and Sale of Video Programming Services to the Public, (November 18, 2004). Available: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf; Further Report on the Packaging and Sale of Video Programming Services to the Public, No. 04-207, 2006 WL 305873 (February 9, 2006).

⁵² Steven S. Wildman, *A Case for A La Carte and “Increased Choice”? An Economic Assessment of the FCC’s Further Report*. National Cable and Telecommunications Association (March, 2006), 1 (“It is rare to see an expert agency completely reverse its own study-based findings over a period of less than 15 months, and it is even rarer to see an agency publicly go to such lengths as the Further Report to discredit the work that supported its own recently articulated position.”). Available: <http://www.ncta.com/PublicationType/ExpertStudy/2821.aspx>.

approach becomes nothing less than a farce. We are now in danger of this being the case in the realm of media policymaking. And when this state of affairs is combined with the strong deregulatory bent that has characterized the past 30 years of media policymaking, we end up in a situation in which the analytical playing field is heavily tilted against any public interest-oriented media regulations – in which case, such regulations will not receive anything close to the fair and objective assessment to which they are entitled.

IV. Conclusion

Public interest media regulation must withstand a challenging policymaking environment, one in which the benefits of such regulations must be convincingly empirically demonstrated, but also one in which the data necessary to make such a demonstration are increasingly difficult to come by, and in which the integrity of the analytical processes associated with making such a demonstration are increasingly being called into question.

It is encouraging to note that there have been some recent improvements to this situation. As was noted previously, the FCC has adopted enhanced disclosure requirements for broadcast licensees, as well as a requirement that broadcasters' public inspection file be made available on-line.⁵³ Such requirements, should they withstand broadcast industry resistance,⁵⁴ have the potential to dramatically improve data quality and availability in this area. In addition, the Commission recently has overhauled its broadband penetration data gathering in an effort to improve the accuracy and granularity of the data that guide this important infrastructure policy area.⁵⁵

⁵³ See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, *supra* note 24.

⁵⁴ See National Association of Broadcasters v. Federal Communications Commission, Petition for Review, United States Court of Appeals for the District of Columbia Circuit (March 27, 2008) (challenging the enhanced disclosure requirements). Available: <http://www.nab.org/AM/Template.cfm?Section=FilingsI&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=12278>.

⁵⁵ See generally, Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriber Data (June 12, 2008). Available: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-89A1.pdf.

There is, however, certainly more that can be done. Possible avenues to consider include mandatory, systematic archiving of representative samples of media content to facilitate robust analyses across markets and outlets over time; possible institutional separation of the data gathering and analysis functions from the policymaking functions; legislative measures to enhance the accessibility to commercial data sources used in policymaking in ways that do not undermine the business models of commercial data providers; and, finally, increased commitment of federal resources to systematic data gathering.⁵⁶

In the end, as we consider the legacy of *Red Lion* and the future of public service media regulation, it is essential that we consider not only constitutional and public interest issues, but also the issue of the information environment that guides policy decision-making in this area.

⁵⁶ See generally, Philip M. Napoli and Joe Karaganis, *Toward a Federal Data Agenda for Communications Policymaking*, 16 *CommLaw Conspectus* 53 (2007).