

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

PHILIP M. NAPOLI, PH.D.\*

## TABLE OF CONTENTS

|  |     |
|--|-----|
| Introduction .....   | 801 |
| I. Paradox One: Evidence-Driven Policymaking Meets<br>Information Vacuums .....                    | 804 |
| II. Paradox Two: Evidence-Driven Policymaking Meets the<br>Politicization of Policy Research ..... | 808 |
| Conclusion .....   | 811 |

## INTRODUCTION

When the Federal Communications Commission (FCC or 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 importantly, that the Fairness Doctrine undermined, rather than achieved, its primary policy goal of increasing the extent to which broadcasters provided citizens with coverage of controversial issues of public importance.<sup>1</sup> This determination was made in the wake of what the FCC described as a “detailed evaluation as to whether or not the Fairness

---

\* Director, Donald McGannon Communication Research Center and Associate Professor at the Graduate School of Business, Fordham University.

1. *Syracuse Peace Council v. FCC*, 2 F.C.C.R. 5043, 5052 (1987), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (“[W]e concluded that, in operation, the fairness doctrine actually thwarts the purpose which it is 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.’” (citation omitted)).

Doctrine in operation, enhances or inhibits the presentation of diverse views on public issues.”<sup>2</sup> This detailed evaluation was the well known 1985 Fairness Report.<sup>3</sup> 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,”<sup>4</sup> a fact that was crucial to the Supreme Court’s review of *Red Lion Broadcasting Co. v. FCC* in 1969.<sup>5</sup>

The 1985 Fairness Report served as the primary evidentiary source for the FCC in its decision to eliminate the Fairness Doctrine two years later.<sup>6</sup> The report emerged from a proceeding in which over one hundred parties submitted comments.<sup>7</sup> It was these comments (particularly those of the National Association of Broadcasters, Meredith Broadcasting, and Sinclair Broadcasting) upon which the report relied to conclude that the Fairness Doctrine was not serving the public interest. This analytical approach was controversial at the time, with some critics emphasizing that the FCC’s decision lacked any systematic statistical analysis and relied too heavily on anecdotal examples by broadcasters.<sup>8</sup> Nonetheless, the Commission’s decision to eliminate the Fairness Doctrine was upheld by the D.C.

---

2. Inquiry into Sec. 73.1910 of the Commc’ns Rules & Regulations, 102 F.C.C.2d 145, 158 (1985) (report).

3. *See id.* at 145–46 (describing the Commission’s inquiries contained in the report).

4. *Id.* at 158.

5. 395 U.S. 367, 392–93 (1969) (assessing the constitutionality of the Fairness Doctrine and describing the possibility that broadcasters would eliminate controversial programming in order to circumvent the doctrine as “at best speculative”).

6. *See Syracuse Peace Council*, 2 F.C.C.R. at 5049–52 (discussing the Federal Communication Commission’s (FCC or Commission) creation of the 1985 Fairness Report and its subsequent findings).

7. Inquiry into Sec. 73.1910 of the Commc’ns Rules & Regulations, 102 F.C.C.2d at 146 (“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.” (citation omitted)).

8. *See, e.g.,* Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a “Chilling Effect”?* *Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279, 299–300 (1997) (“Within the legislative policy debate, the FCC has been criticized by Congress for its 1985 finding that the [Fairness Doctrine] ‘chilled’ free speech, precisely on the grounds that it reached such a conclusion lacking any factual or ‘statistical’ basis.” (citation omitted)); Inquiry into Sec. 73.1910 of the Commc’ns Rules & Regulations, 102 F.C.C.2d at 180, 185 (“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.” (citation omitted)); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 662 (D.C. Cir. 1989) (“Several parties, however, have attacked the evidence of broadcaster chill and what they contend is the Commission’s failure to respond adequately to the attacks.”).

Circuit,<sup>9</sup> with the court endorsing the rigor of the Commission's analytical process<sup>10</sup> while also granting substantial deference to the Commission's expert judgment on the matter.<sup>11</sup> Importantly, the court upheld the FCC's decision purely on policy grounds, declining to consider the constitutional issues raised by the Fairness Doctrine.<sup>12</sup>

Assessments of media regulation in the name of the public interest, based on policy rather than constitutional grounds, as well as the analytical tools and processes employed by policymakers to do so, will be the focus of this discussion. Specifically, the analytical dynamics surrounding the elimination of the Fairness Doctrine shed light on current analyses of public interest media regulation. It is the contention of this Article that the promotion of a robust information environment—in which the objective data necessary to guide well-informed policymaking are gathered and made widely available—is a crucial element of public interest media policymaking.

When we look back at the FCC's inquiry into the efficacy of the Fairness Doctrine, the differences between it and contemporary media policy analysis are striking. Today, the analytical environment is much different. The demand for rigorous, defensible empirical analyses of FCC policies has become more pronounced in virtually all quarters.<sup>13</sup> The courts, in particular, have become increasingly demanding, exhibiting a decreasing willingness to defer to the Commission's expert judgment.<sup>14</sup> Congress, through legislation such as the Data Quality Act,<sup>15</sup> has increased the analytical burden on the FCC. Yet at the same time, the quality, scope, and accessibility of the data necessary to engage in such analyses are declining,<sup>16</sup> and the policymaking process itself seems to be increasingly

---

9. See *Syracuse Peace Council v. FCC*, 867 F.2d at 669 (“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 *id.* at 660–66 (analyzing and upholding the evidentiary sources the Commission relied upon in the 1985 Fairness Report).

11. See *id.* at 660 (“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. *Id.* at 669.

13. See Robert Corn-Revere, *Economics and Media Regulation*, in *MEDIA ECONOMICS: THEORY AND PRACTICE* 71, 83 (Alison Alexander et al. eds., 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’ . . .” (citation omitted)); Philip M. Napoli, *The Unique Nature of Communications Regulation: Evidence and Implications for Communications Policy Analysis*, 43 *J. BROAD. & ELEC. MEDIA* 565, 576–77 (1999) (discussing the implications of this trend for communications policymaking).

14. See Napoli, *supra* note 13, at 571–73 (discussing decisions made in the D.C. and Seventh Circuits).

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

16. See *infra* notes 21–38 and accompanying text.

politicized.<sup>17</sup> These fundamental paradoxes and their implications for the future of public interest media regulation are discussed below.

### I. PARADOX ONE: EVIDENCE-DRIVEN POLICYMAKING MEETS INFORMATION VACUUMS

It is well-documented that the past forty years have seen a strong turn toward evidence-driven policymaking.<sup>18</sup> This tendency has been particularly pronounced for media policy, where empirical analysis has increasingly been used to support decisionmaking and the courts demand rigorous empirical analyses to support policy decisions.<sup>19</sup>

What has received far less attention, however, is how the information environment has evolved during this transition. It would seem logical to presume that the increasing move toward evidence-driven policymaking would be accompanied by substantial efforts to increase the analytical resources available. 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 demands placed on the FCC. At worst, the information environment is degrading while the demands being placed on the Commission 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 halted gathering financial statements from broadcasters,<sup>20</sup> ceased gathering cable system subscriber data,<sup>21</sup> and reduced requirements for

---

17. See *infra* notes 39–53 and accompanying text.

18. See DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 6–7 (1997) (describing the “rationality project” that she sees as “a core part of American political culture almost since the beginning”); 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 policymaking 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* notes 13 & 14.

20. See 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 several years ago.”).

21. See 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://projects.publicintegrity.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 ‘deregulation’ of the industry in 1994”).

broadcaster performance data in connection with the license renewal process.<sup>22</sup> Such scaling back often has been associated with the general deregulatory trend and efforts to alleviate reporting burdens on the regulated industries. Of course, the larger effect (be it intentional or unintentional) is to create information vacuums that hamper the kinds of analyses that have become an increasingly prominent part of contemporary media policymaking.

This paradox was well-illustrated in a speech given by FCC Commissioner Robert McDowell<sup>23</sup> in which he expressed opposition to a recent decision by the Commission to reverse the decades-long trend of reducing the amount of information gathered from broadcast licensees by increasing licensee reporting requirements.<sup>24</sup> Under its new rules, the Commission would require licensees to provide information on a quarterly basis regarding a range of programming categories that historically have been linked with serving the public interest. Commissioner McDowell questioned why the Commission would want such information, suggesting that it would most likely open the door to increased content regulation.<sup>25</sup> An alternative answer as to why the Commission would want such information can be found in the FCC's 2002 and 2007 media ownership studies.<sup>26</sup> The Commission's studies include detailed evaluations of the relationship between media ownership and market characteristics. In addition, the Commission analyzed the provision of the kinds

---

22. See Radio Broadcast Services: Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees, 49 Rad. Reg. 2d (P&F) 740, 741 (1981) (adopting a simplified application as the standard for license renewal).

23. Robert M. McDowell, Comm'r, Fed. Comm'ns Comm'n, Keynote Address at the 2008 Quello Communications Law and Policy Symposium 4–5 (Apr. 23, 2008) [hereinafter McDowell Address], available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-281772A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281772A1.pdf).

24. See *id.* at 4 (“I cast a dissenting vote against this new form . . .”). See generally Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, 23 F.C.C.R. 1274 (2008).

25. Commissioner McDowell said the following:  
Although the Commission has not mandated certain types of programming, we are regulating with a wink and a nod by requiring lists of such programs. Why does the FCC need a list of the religious programming aired on a station? Why do we require a list of all local civic affairs programming? Why do we need to know whether it was locally produced or part of a regularly scheduled program?  
McDowell Address, *supra* note 23, at 5.

26. THOMAS C. SPAVINS ET AL., THE MEASUREMENT OF LOCAL TELEVISION NEWS AND PUBLIC AFFAIRS PROGRAMS, FCC MEDIA BUREAU STAFF RESEARCH PAPER 2002-7 (2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A12.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.pdf); GREGORY S. CRAWFORD, TELEVISION STATION OWNERSHIP STRUCTURE AND THE QUANTITY AND QUALITY OF TV PROGRAMMING: FCC MEDIA OWNERSHIP STUDY #3 (2007), available at [http://fjallfoss.fcc.gov/edocs\\_public/openAttachment.do?link=DA-07-3470A4.pdf](http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A4.pdf); Daniel SHIMAN ET AL., FCC MEDIA STUDY #4: NEWS OPERATIONS (2007), available at [http://fjallfoss.fcc.gov/edocs\\_public/openAttachment.do?link=DA-07-3470A5.pdf](http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A5.pdf).

of programming categories articulated in the new reporting requirements.<sup>27</sup> And because broadcast licensees have not been required to report such information until very recently, inadequate data crippled the Commission's studies.<sup>28</sup> The Commission engages in studies of this type to meet the analytical standards that Congress and the courts have placed on the FCC. To refrain from gathering the type of data necessary to meet this analytical standard is paradoxical, to say the least.

A second 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.<sup>29</sup> Two policy-specific issues arise from this: (1) the access terms and provisions associated with commercial databases often are too restrictive to facilitate an open and transparent policymaking process; and (2) the data are often gathered with the needs of commercial clients, rather than with the needs of policymakers and policy researchers, in mind.

Regarding the first issue, there have been a number of recent controversies surrounding the accessibility of data underlying 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 mean that public access to the data guiding policymaking is often severely limited.<sup>30</sup> Most recently, 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 relating to the Commission's localism proceeding.<sup>31</sup> Even access to data gathered by the FCC itself has proven difficult. The Commission has restricted access to broadband penetration data on the grounds that it may divulge trade secrets.<sup>32</sup> With the second issue, the key

---

27. See Spavins, *supra* note 26, at pts. I, III (analyzing the relationship between ownership and the quality and quantity of local news programming); see also Crawford, *supra* note 26, at 3–4 (examining the relationship between ownership structure and the provision of news and public affairs programming); Shiman, *supra* note 26, at IV-4 to IV-5 (examining the relationship between television and radio station ownership, market structures, and the provision of news and public affairs programming).

28. See Philip M. Napoli & Joe Karaganis, *Toward a Federal Data Agenda for Communications Policymaking*, 16 *COMMLAW CONSPECTUS* 53, 72–75 (2007) (reviewing the shortcomings of the FCC's media ownership studies).

29. See generally Philip M. Napoli & Michelle Seaton, *Necessary Knowledge for Communications Policy: Information Asymmetries and Commercial Data Access and Usage in the Policymaking Process*, 59 *FED. COMM. L.J.* 295 (2007) (reviewing communications policymakers' increased reliance on commercial data sources).

30. See *id.* at 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." (citation omitted)).

31. Complaint, Inst. for Pub. Representation v. FCC, No. 07CV02092 (D.D.C. 2007), *dismissed*, 2007 WL 2900431 (D.D.C. July 9, 2008).

32. See generally Benjamin W. Cramer, Paper, "The Nation's Broadband Success

concern 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 or targeted media outlets or minority audiences.<sup>33</sup>

This issue rose to prominence within the context of the FCC's efforts to determine the extent of cable penetration in the United States in conjunction with its annual report on competition in the video programming market. An early draft of the competition report was said to rely on data from Warren Communications (a commercial publisher of media industry data)<sup>34</sup> in determining that national cable penetration met the 70% threshold that triggers greater FCC regulatory authority over the industry.<sup>35</sup> These data contradicted other commercial data sources, demonstrating that penetration levels were in the 60% range.<sup>36</sup> More importantly, Warren Communications conceded that its data were not well-suited to determining whether the threshold had been met.<sup>37</sup> The issue has triggered a debate over the current state of cable penetration in the United States and the validity of the different commercial data sources available for making such a determination.<sup>38</sup> As a result, the validity of the

---

Story": The Secrecy of FCC Broadband Infrastructure Statistics (Sept. 28, 2008), [http://tprcweb.com/files/BCramer%20TPRC%20FINAL\\_Broadband%20Stats.pdf](http://tprcweb.com/files/BCramer%20TPRC%20FINAL_Broadband%20Stats.pdf) (presented at the Telecommunications Policy Research Conference).

33. See Napoli & Seaton, *supra* note 29, at 325 (discussing gaps in BIA Media Access Pro and Arbitron data in relation to minority media markets and foreign language media outlets).

34. Jonathan Make, *November FCC Meeting to Focus on Cable Industry*, COMM. DAILY, Nov. 14, 2007.

35. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 612(g), 98 Stat. 2779, 2784-85 (codified at 47 U.S.C. § 532). 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 rules necessary to provide diversity of information sources." *Id.*

36. Letter from Kyle E. McSlarrow, President & CEO, Nat'l Cable & Telecomms. Ass'n, to Kevin J. Martin, Chairman, Fed. Commc'ns Comm'n and Comm'rs (Nov. 14, 2007), available at <http://www.ncta.com/DocumentBinary.aspx?id=648> (noting cable penetration of 58.1% according to SNL Kagan data and cable penetration of 61.1% according to Nielsen Media Research).

37. Make, *supra* note 34.

38. See, e.g., Letter from Harold Feld & Andrew Jay Schwartzman, Media Access Project, to Robert M. McDowell & Deborah Taylor Tate, Comm'rs, Fed. Commc'ns Comm'n (Nov. 16, 2007) (on file with author) (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 et al., Nat'l Cable & Telecomms. Ass'n, to Marlene H. Dortch, Sec'y, Fed. Commc'ns Comm'n (Nov. 20, 2007) (on file with author) (arguing against the accuracy of the Warren data); Letter from Craig E. Moffett, Vice President, Sanford C. Bernstein & Co., LLC, to Jonathan S. Adelstein, Comm'r, Fed. Commc'ns Comm'n (Nov. 21, 2007) (arguing against the accuracy

competition report remains uncertain.<sup>39</sup>

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 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 resources necessary to engage in the full range of data-gathering activities needed to inform its policymaking. Hence, the FCC neglects certain data-gathering activities and comes to rely increasingly on third-party data providers. The bottom line is that the information environment is not sufficiently reconfigured to reflect the analytical environment in which media policymakers must operate.

Given that public interest regulations in a predominantly deregulatory policy environment must have their benefits demonstrably outweigh their costs in order to survive, an information environment with substantial data gaps—like those described above—represents a particular danger for the future of public interest media regulation. Were the Supreme Court to consider the Fairness Doctrine today, the Court would likely demand rigorous evidence that the Fairness Doctrine provides the benefits ascribed to it. Unfortunately, the raw data necessary to make such a determination would most likely not be available.

## II. PARADOX TWO: EVIDENCE-DRIVEN POLICYMAKING MEETS THE POLITICIZATION OF POLICY RESEARCH

The trend toward evidence-driven policymaking provides a starting point for the second key paradox of contemporary media policymaking, where the trend conflicts with an increasingly politicized policy environment. This is not to say that media policymaking has not always been a fundamentally political process. It most definitely has.<sup>40</sup> Rather, the point here is that there have been changes to the dynamics of media policymaking that have exacerbated this situation. The first change involves the increased growth, diversification, and economic significance of the media and communications sector in the United States. Simply put, the stakes are higher today than they were in the past, with a broader range

---

of the Warren data).

39. Barbara Esbin & Adam Thierer, *Where Is the FCC's Annual Competition Report?*, THE PROGRESS AND FREEDOM FOUNDATION, PROGRESS SNAPSHOT 4.11 (May 2008), <http://pff.org/issues-pubs/ps/2008/ps4.11whereisFCCvidcompreport.html>.

40. See generally ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION* (3d ed. 1982).

of stakeholders having an interest in decision outcomes. The second change (and this is related to some degree to the first) is the greater public attention to media policy issues. As media and communications technologies have become a more integral part of citizens' lives, media policy issues are mobilizing both citizens and public interest groups to an unprecedented degree.<sup>41</sup> This also contributes to the highly politicized policymaking environment, since what interests the citizenry inevitably attracts more attention from Congress.

The pressures on media policymakers are therefore greater and more varied today. And as a result, we are seeing political strategies that increasingly manifest themselves in the information environment that steers 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 incidents in which the FCC was accused of selectively withholding 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 media ownership regulations—were leaked to Senator Barbara Boxer.<sup>42</sup> This led to widespread speculation that the FCC was attempting to manipulate the analytical process in favor of deregulation. This controversy served as the catalyst for an internal investigation into the FCC's analytical process by the FCC's Inspector General<sup>43</sup> and the ultimate release of the studies to the public.<sup>44</sup>

Such criticisms intensified upon the subsequent release of a paper authored by the FCC's then-Chief Economist that she described as “an attempt to share some thoughts and ideas I have about how the FCC can approach relaxing newspaper–broadcast cross-ownership restrictions.”<sup>45</sup> In

---

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

42. Letter from Barbara Boxer, Senator, to Kevin J. Martin, Chairman, Fed. Commc'ns Comm'n (Sept. 18, 2006) (on file with author) (“[T]his 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.”).

43. OFFICE OF INSPECTOR GENERAL, FED. COMM'NS COMM'N, REPORT OF INVESTIGATION INTO ALLEGATIONS THAT SENIOR MANAGEMENT ORDERED RESEARCH SUPPRESSED OR DESTROYED (2007).

44. See, e.g., FED. COMM'NS COMM'N, DO LOCAL OWNERS DELIVER MORE LOCALISM?: SOME EVIDENCE FROM LOCAL BROADCAST NEWS (July 2004); FED. COMM'NS COMM'N, REVIEW OF THE RADIO INDUSTRY, 2003 (Sept. 2003), available at <http://www.fcc.gov/ownership/additional.html>.

45. LESLIE M. MARX, SUMMARY OF IDEAS ON NEWSPAPER–BROADCAST CROSS-OWNERSHIP 3 (2006), available at <http://www.fcc.gov/ownership/materials/newly-released/newspaperbroadcast061506.pdf>.

terms of relevant research, the paper outlines “some studies that might provide valuable inputs to support a relaxation of newspaper–broadcast cross-ownership limits.”<sup>46</sup> Statements such as these raise concerns that the FCC is conducting results-driven research under the guise of an evidence-driven analytical process.

More recently, in a rulemaking decision involving possible broadcast signal interference arising from the operation of a new “broadband over power line” service,<sup>47</sup> the Commission initially refused to release five studies that it relied upon in reaching its conclusions. Only after two FOIA requests did the Commission release the studies—with substantial portions redacted.<sup>48</sup> The D.C. Circuit found these actions central in its decision to remand the issue back to the Commission, requiring it to make the studies available in unredacted form.<sup>49</sup> In issuing this decision, the court noted that “[i]t would appear to be a fairly obvious proposition that 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.”<sup>50</sup>

The process through which research occurs is also increasingly called into question. For instance, the FCC’s selection of researchers for its most recent media ownership studies, as well as the solicitation and incorporation of external peer reviews, has been the subject of congressional inquiry.<sup>51</sup> A number of academic and public interest organization analyses of these processes have been similarly critical.<sup>52</sup>

---

46. *Id.* at 14.

47. *See* Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems, 19 F.C.C.R. 21,265, 21,266 (2004).

48. *See* *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 232–33 (D.C. Cir. 2008) (“When the League filed a second FOIA request . . . the Commission released five studies in redacted form and made them part of the record . . .”).

49. *See id.* at 240 (“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.”) (citation omitted).

50. *Id.* at 237.

51. *See* Letter from Maurice D. Hinchey, Bart Stupak, Tammy Baldwin, Louise M. Slaughter & David Price, Representatives, U.S. Congress, to Kevin J. Martin, Chairman, Fed. Comm’n Comm’n (Sept. 14, 2007) (on file with author) (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).

52. *See generally* MARK COOPER, CONSUMER FEDERATION OF AMERICA, BIASED QUESTIONS YIELD BIASED ANSWERS: HOW THE FCC LOADED THE DICE IN SETTING ITS MEDIA OWNERSHIP RESEARCH AGENDA (2007); Mark N. Cooper, Paper, *Junk Science and Administrative Abuse in the Effort of the FCC to Eliminate Limits on Media Concentration* (May 23, 2008) (presented at the Annual Meeting of the International Communication Association) (on file with author); Colleen Mihal, Paper, *Research as Alibi: Analysis of the FCC’s 2006–2007 Media Ownership Studies* (June 5, 2008) (presented at the academic pre-

Industry stakeholders also have taken note of a potentially results-driven approach to policy research within the FCC. The National Cable and Telecommunications Association, for instance, issued a highly critical report of the contradictory policy recommendations contained within two FCC studies of the cable industry's à la carte issue.<sup>53</sup> The report obliquely suggested that the second report (which supported à 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.<sup>54</sup>

It is, of course, naïve to assume that policy research is ever conducted in a purely objective manner and devoid of broader political considerations. However, should the credibility of the policy research and policymaking relationship suffer too many hits, the notion that policymaking has evolved from the more intuitive approach of the past to a more objective, evidence-driven approach becomes nothing less than a farce. We are now in danger of this being the case in the realm of media policymaking. When this state of affairs is combined with the strong deregulatory bent that has characterized the past thirty years of media policymaking, the analytical playing field becomes heavily tilted against any public-interest-oriented media regulations, with the result that such regulations will not receive the fair and objective assessment to which they are entitled.

#### CONCLUSION

Public interest media regulation must withstand a challenging policymaking environment—one in which the benefits of such regulations must be convincingly and empirically demonstrated, but also one in which the data necessary to make such a demonstration are increasingly difficult to obtain. Furthermore, 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 discussed previously, the FCC adopted enhanced disclosure requirements for broadcast licensees, as well as a requirement that broadcasters' public-inspection files be made available

---

conference for the National Conference for Media Reform) (on file with author).

53. See FED. COMM'NS COMM'N, FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC 3 (2006), 2006 WL 305873; FED. COMM'NS COMM'N, REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC 3–5 (2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-254432A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf).

54. STEVEN S. WILDMAN, NAT'L CABLE AND TELECOMMS. ASS'N, A CASE FOR À LA CARTE AND "INCREASED CHOICE"?: AN ECONOMIC ASSESSMENT OF THE FCC'S FURTHER REPORT 1 (2006), <http://www.ncta.com/PublicationType/ExpertStudy/2821.aspx> ("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.").

online.<sup>55</sup> Such requirements, should they withstand broadcast-industry resistance,<sup>56</sup> have the potential to dramatically improve both data availability and quality in this area. In addition, the Commission recently overhauled its broadband penetration data-gathering practices in an effort to improve its accuracy.<sup>57</sup>

There is, however, certainly more that can be done. Possible avenues to consider include requiring systematic archiving of representative samples of media content to facilitate robust analyses across markets and outlets over time; mandating institutional separation of data-gathering and analytical functions from policymaking functions; enacting 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, increasing federal resources devoted to systematic data gathering.<sup>58</sup> 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 information environment that guides policy decisionmaking in this area.

---

55. See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, *supra* note 24, at 1275, 1296.

56. See Petition for Review, Nat'l Ass'n of Broadcasters v. FCC, No. 08-1135 (D.C. Cir. Mar. 27, 2008), available at <http://www.nab.org/AM/Template.cfm?Section=Filings1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=12278> (challenging enhanced disclosure requirements).

57. See generally Development of Nationwide Broadband Data, 23 F.C.C.R. 9691, 9692 (2008) (report and order and notice of further rulemaking).

58. See generally Napoli & Karaganis, *supra* note 28.