COMMUNICATIONS POLICY-MAKING AT THE FCC: PAST PRACTICES, FUTURE DIRECTION*

BY STUART N. BROTMAN**

TABLE OF CONTENTS

I. INTRODUCTION 56
II. THE FCC'S ROLES IN NEGOTIATION 57
III. AN FCC NEGOTIATION TOPOGRAPHY 59
A. *Negotiated Self-Regulation in Lieu of Commission Action* 59
B. *Negotiated Self-Regulation as a Guideline for Commission Action* 60
C. *Benign Guidance About Acceptable Negotiation Behavior* 60
D. *Acceptance of Competing Industry Association Joint Proposals* 60
E. *Acceptance of a Negotiated Agreement Fostered by Another Government Agency* 61
F. *Negotiation Through* Ex Parte *Contracts* 61
G. *Encouraging Negotiated Settlement by Establishing FCC Rate Schedules* 61
H. *Competition with the Private Negotiation Process* 62
I. *Facilitating Negotiation to Forestall Adjudication* 62
J. *Deferring to Mediation by Established Industry Forums* 62
K. *Deference to Arbitration by Outside Appointed Parties* .. 62
L. *Assuming the Role of an "Honest Broker"* 63
M. *Mandating a Negotiation Standard* 63
N. *Creating a "Solomon-Like" Solution* 63
IV. NEGOTIATION AT THE FCC: CASE ILLUSTRATIONS 63
A. *Broadcasting* 63
1. A Family Viewing Policy for Television 63

---

* This piece was originally presented at the Annenberg Washington Program in Communications Policy Studies at Northwestern University, in December 1987.

** Senior Management Adviser/Communications, Lexington, Massachusetts; B.S., Northwestern University; M.A., University of Wisconsin; J.D., University of California at Berkeley. Member, State Bar of California. The Annenberg Washington Program in Communications Policy Studies of Northwestern University is providing the support for the research project from which this article is derived. The views expressed herein, however, are solely those of the author.

2. Children's Television 68
3. Broadcaster-Citizen Group Agreements 73
4. Daytime-Only Radio Station Operating Authority 78
B. *Cable Television* 81
1. Basic Cable Policy Development 81
2. Pay Cable Policy Development 85
3. Cable Television Pole Attachment Policies ... 86
4. Revising the Must-Carry Rules 89
C. *Common Carriers* 92
1. Access to Local Telephone Exchange Facilities by Common Carrier Services 92
2. Interexchange/Local Exchange Disputes 95
3. The Frequency Coordination Process 96
4. Exchange Network Facilities for Interstate Access (ENFIA) 99
5. Uniform Settlement Policy 106
6. Alaska Earth Stations 107
V. NEGOTIATED RULEMAKING AS A POLICY TOOL 109
VI. CONCLUSION 113

I. INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission"), now over fifty years old, remains the focal point for those who wish to understand how communications policy is formulated and implemented in the United States. The FCC's broad legislative mandate—embodied in the Communications Act of 1934,[1]—provides a virtually limitless foundation for the Commission to regulate most forms of electronic and wire communications.[2]

Historically, the Commission's policy-making process can best be described in terms of the two institutional roles that the agency assumes simultaneously. Where an adjudicatory proceed-

---

[1] 47 U.S.C. § 307(a) (1982).

[2] Former FCC General Counsel Henry Geller has commented that in enacting the Communications Act, Congress said, in effect: "[H]ere is a new field, communications; we have no idea how it will develop so we leave it to you to do the best you can in the public interest." H. GELLER, A MODEST PROPOSAL TO REFORM THE FEDERAL COMMUNICATIONS COMMISSION 31 (1974). Former Commissioner Glen Robinson believes that "the Communications Act could be described with only modest exaggeration as a grant of power to regulate electronic communications as the FCC deems necessary. Indeed, even that description does not do full justice to the scope of the Commission's substantive discretion." *The Federal Communications Commission*, in COMMUNICATIONS FOR TOMORROW 355 (G. Robinson ed. 1978).

ing is at issue, the FCC serves in a judicial-like capacity, weighing evidence presented in a trial-type forum and rendering a decision based solely on a formal record.[3] In contrast, today, most broad policy decisions are the product of informal Rule Making which is carried out through an informal notice-and-comment proceeding among interested parties. As with the adjudicatory proceedings, the FCC compiles a record in notice and comment proceedings that is used as a basis for decisionmaking, but its role is generally legislative in nature.[4]

Most analyses of the FCC, therefore, have focused on how the Commission acts in both a judicial and legislative capacity.[5] Exploration of how the FCC serves as a catalyst for negotiation has not been pursued in a systematic fashion.

This Article addresses the FCC's role in developing communications policy by negotiation. Unlike formal Rule Making or adjudicatory proceedings, a record of this process is not contained in the volumes of decisions and policy statements that are accessible to interested parties. In an attempt to compile a definitive resource in this area, this Article details the Commission's involvement in stimulating and overseeing negotiation activities by outside parties and its adoption of negotiation settlements as FCC policy.

This Article will illustrate that the FCC has a successful track record in achieving significant outcomes through negotiation. A review of the Commission's past *ad hoc* activities suggests that the agency is well suited to utilize negotiation as a policy tool of last resort.

The FCC's successful implementation of the negotiation process invites an analysis of how, and under what circumstances, it can build upon prior negotiation through institutionalizing it in some manner. It is this Article's thesis that in building on prior successes, the FCC should employ negotiation as a tool of first resort, rather than last, by institutionalizing the process.

II. THE FCC'S ROLES IN NEGOTIATION

FCC negotiation activities are typically initiated when an impasse cannot be resolved through conventional adjudication or

---

[3] *See, e.g.*, Baker, *Policy By Rule Or Ad Hoc Approach: Which Should It Be?*, 22 L. & CONTEMP. PROBS. 658, 659 (1957).

[4] 47 U.S.C. §§ 154(i); 303(f),(i),(j),(r); 308(b), 403 (1982 & Supp. III 1985). *See also* BAKER, *supra* note 3 at 667-70.

[5] *See, e.g.*, E. KRASNOW, L. LONGLEY & H. TERRY, THE POLITICS OF BROADCAST REGULATION 33 (1982).

informal Rule Making.[6] In these instances, the FCC has sought to create a consensus in advance of its own decision by facilitating agreements among disputants or interested parties. The agency may then approve the consensus under the broad "public convenience, interest, or necessity" mandate of the Communications Act.[7]

The primary policy path currently involves outside parties presenting opposing arguments to the FCC in either trial-type or notice-and-comment proceedings. The staff, resources and time required to complete such a proceeding, plus the likelihood of an even more time-consuming judicial appeal, frequently represents a formidable barrier to meaningful policy formulation under either procedure.[8] The most useful application of negotiation in the Commission's activities has been the agency's ability to break this potential "policy loop," i.e., the chain of decision/appeal/reversal/remand/decision, by encouraging interested parties to resolve disputes among themselves and propose solutions subject to Commission modification and review.

The FCC has utilized negotiation to achieve policy "breakthroughs" in the various areas of its jurisdiction, such as broadcasting, cable television, and common carriers. In broadcasting, there has been a strong incentive to rely on negotiation rather than regulation in order to avoid sensitive first amendment concerns regarding programming content.[9] Negotiation has also been utilized to obviate time-consuming adjudication proceedings that can be triggered when the renewal or transfer of a broadcast license is challenged.[10]

In cable television, the FCC's regulatory scheme has evolved with reference to how cable will affect the activities of established electronic media players. These established players, principally broadcasters and programmers, have had their dominant position in the marketplace undercut by the growth of cable television. Commission-initiated negotiation activities in this area have been aimed at bringing together these competing economic

---

6 *See* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

7 47 U.S.C. § 307(a) (1982).

8 *See* Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1259, 1273-76 (1981).

9 *See infra* notes 28-55 and accompanying text.

10 *See infra* notes 81-108 and accompanying text.

forces so that peaceful co-existence can be created.[11] Negotiation with common carriers involves a need to resolve complex economic or technical problems where the FCC lacks sufficient in-house resources or where outside resources are clearly superior.[12]

In addition to reviewing primary and secondary source materials, this article was researched by conducting background interviews covering the range of FCC negotiation activities. A smaller sample of case illustrations was then identified. These examples raise broad policy concerns, or involve negotiation as central to a policy outcome.

The FCC's involvement in negotiated communications policy-making cannot be reduced to a formula or a matrix. The Commission regulates dynamic technologies and ever-changing marketplace forces. Consequently, its decisions are often ones of first impression, based upon facts that were not reviewed in prior decisions.

Successful negotiations have far outweighed those that have failed, suggesting that the Commission may have an implicit sense of when negotiation can best be used. This, in itself, is an important finding.

III. An FCC Negotiation Topography

Given the *ad hoc* nature of FCC negotiation activities, there has been no effort to compile and/or relate negotiation activities over the years. The case illustrations presented here are intended to provide a sense of institutional memory, and to stimulate current and future FCC staff members and interested parties to better understand negotiation activities as they arise.

The topographical approach should provide a broad view of the many ways that the FCC has utilized negotiation. In effect, the following summary of the various roles of negotiation will serve as a guide for the case illustrations that follow.

A. *Negotiated Self-Regulation in Lieu of Commission Action*

Regulated communications industries have a history of self-regulation through trade associations such as the National Association of Broadcasters ("NAB"). The FCC will defer to a self-regulatory proposal when the Commission is unclear about what

[11] *See* Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 Va. L. Rev. 541, 553 (1975).

[12] *See infra* footnotes 188-212 and accompanying text.

policy steps it could take on its own without violating its statutory mandate or the Constitution itself. In other words, the Commission actively engages in "jawboning"[13] to promote self-regulation.[14]

B. *Negotiated Self-Regulation as a Guideline for Commission Action*

The FCC frequently defers to self-regulation where sensitive first amendment issues may arise. This typically occurs where program content is at issue. In this context, the Commission adopts industry guidelines in order to respond to public interest concerns while avoiding subsequent first amendment challenges to the adoption of these guidelines.[15]

C. *Benign Guidance About Acceptable Negotiation Behavior*

The FCC will usually defer to negotiated solutions that are reached by outside disputants. When the disputants reach a settlement, the FCC is asked to dismiss the action. The Commission will comply with the request unless there is evidence that the settlement will undermine the Commission's mandate to act in the "public convenience, interest, or necessity" standard under the Communications Act. To ensure that these negotiations are conducted with the Commission's role as the final regulatory authority in mind, the FCC established a policy that in effect encourages disputants to reach a mutually satisfactory agreement which does not violate the public trustee scheme or contradict prior representations made to the Commission.[16]

D. *Acceptance of Competing Industry Association Joint Proposals*

Engineering issues are significant for both industry associations and the Commission. The FCC looks to the private sector for guidance concerning these technical issues because the private sector has the expertise to suggest how engineering operations can be modified. When the private sector does not agree upon a solution, the Commission must sometimes choose between conflicting presentations of engineering data. In some

---

[13] *See infra* text accompanying notes 28-55. Jawboning is the FCC's practice of strongly encouraging parties to adopt self-regulation in order to avoid formal Commission or legistative action.

[14] *See infra* note 33.

[15] *See infra* notes 56-80 and accompanying text.

[16] *See infra* notes 81-108. It has long been the policy of the Commission to encourage affirmative dialogue between broadcast licensees and members of the public served by the licensees' stations. The licensee must assume and bear responsibility for planning, and the standard of service must be the public interest.

cases, private interests work out compromise plans after rounds of Commission proceedings. The FCC may express its approval and adopt the joint proposal as its own.[17]

E. *Acceptance of a Negotiated Agreement Fostered by Another Government Agency*

Attempts by the Commission to serve as an "honest broker" in negotiations may raise suspicions about its neutrality. The question emerges as to whether the FCC can ever be neutral, even if its intentions are to achieve a successful policy outcome. This question is particularly evident when one or more of the Commissioners is perceived as having a bias in favor of a particular industry or policy outcome. Since 1970, the White House Office of Telecommunications Policy and its successor, the National Telecommunications and Information Administration, have provided the FCC with a neutral setting for private interests to negotiate consensus agreements. Such agreements may then be submitted to the Commission for adoption in an ongoing informal rulemaking proceeding.[18]

F. *Negotiation Through* Ex Parte *Contracts*

This form of negotiation represents the classic example of closed-door decisionmaking, decisionmaking that undermines general notions of fair play in the policy-making process. The FCC proceeds with informal Rule Making, then invites industry representatives to confidential meetings where a policy is negotiated, without affording other participants an opportunity to respond. This casts doubt on the legitimacy of the informal Rule Making process as a whole.[19]

G. *Encouraging Negotiated Settlement By Establishing FCC Rate Schedules*

In a rate dispute, the Commission will make all parties aware of their best alternative to a negotiated agreement.[20] The best alternative is merely a rate schedule set out in advance by the

---

17 *See infra* notes 109-24 and accompanying text.

18 *See infra* notes 125-43 and accompanying text.

19 *See infra* notes 144-49 and accompanying text.

20 R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 104 (1981). During negotiations, parties often worry that they will fail to reach an agreement on an important business decision. One party may be too quick to accommodate the views of the other. By the Commission making the parties aware of the worst acceptable outcome, however, they can protect themselves from accommodating the other party at too low a price. *Id.*

FCC. The disputants therefore know the "bottom line" from the outset, and those who want to avoid it will have a powerful incentive to produce an agreement among themselves.[21]

H. *Competition with the Private Negotiation Process*

The resolution of a cross-industry dispute proceeds with most of the major stakeholders participating. The Commission does not recognize this process, however, and makes no attempt to enhance its legitimacy. Instead, the FCC attempts to generate its own solution, even if it will be unacceptable to the parties involved. Such competitive behavior leaves the FCC open to further litigation and perpetuates the endless policy loop.[22]

I. *Facilitating Negotiation To Forestall Adjudication*

In complex tariff disputes, trial-type hearings are usually held; even these abbreviated hearings, however, reinforce the adversarial process. As an alternative, the Commission, at the suggestion of one of the parties, holds the proceedings in abeyance while negotiations are held under the auspices of the Common Carrier Bureau Chief. When a settlement is reached, the FCC makes an independent evaluation of its merits and retains authority to intervene if necessary.[23]

J. *Deferring to Mediation by Established Industry Forums*

Special-purpose industry forums established by trade associations often handle technical disputes. The Commission encourages these forums to resolve most private disputes, so that only the most significant technical disputes are brought to the FCC for resolution. While the Commission maintains an ongoing liaison with industry forums and keeps apprised of disputes and solutions that are evolving, it does not play an active role in the forums themselves.[24]

K. *Deference to Arbitration by Outside Appointed Parties*

The Commission is required to resolve disputes regarding the assignment of frequencies to private, mobile radio services. By designating outside arbitrators, who recommend frequency assignments to the FCC and who review FCC assignments if

---

21 *See infra* notes 150-68 and accompanying text.
22 *See infra* notes 169-87 and accompanying text.
23 *See infra* notes 188-203 and accompanying text.
24 *See infra* notes 204-12 and accompanying text.

post-designation disputes arise, the Commission is able to maintain a system of efficient spectrum management.[25]

L. *Assuming the Role of an "Honest Broker"*

Perhaps the only situation where the Commission can truly be the "honest broker" is where circumstances require an interim solution that will not prejudice later FCC decisionmaking in the same area. In this situation, all parties know that the FCC will be acting, and that any agreement they reach will not be an ultimate solution. The FCC can, however, help negotiations along by facilitating an adequate short-term solution.[26]

M. *Mandating a Negotiation Standard*

Private parties are free to set rates with foreign governments for international communication services. In order to prevent foreign correspondents from using their monopoly status unfairly, however, the FCC requires that the first negotiation produce an agreement. All parties who subsequently enter the market will be bound by the same terms.[27]

N. *Creating a "Solomon-Like" Solution*

When faced with the problem of mutually exclusive applications for common carrier services, the FCC will award joint licenses, leaving licensees to work out the details. The commission includes, however, a stipulation that the parties specify some means for arbitration to resolve controversies arising before or after contract negotiation.

IV. NEGOTIATION AT THE FCC: CASE ILLUSTRATIONS

A. *Broadcasting*

1. A Family Viewing Policy for Television

FCC chairmen historically utilize the "bully pulpit," i.e., use their position of authority to make pronouncements about policy objectives and to gauge Congressional, industry and public reaction to policy alternatives before initiating formal proceedings.[28]

---

[25] *See infra* notes 213-26 and accompanying text.
[26] *See infra* notes 227-65 and accompanying text.
[27] *See infra* notes 266-68 and accompanying text.
[28] *See* Brotman, *Judge David Bazelon: Making the First Amendment Work*, 33 FED. COMM. L.J. 39, 45 (1981). The broadcaster stated that "[w]e are a member of a group that operates a number of stations and are going to cable TV, and our growth depends on FCC approval." *Id.*

The bully pulpit also has been used to affect changes beyond the bounds of public discourse. In such instances, the chairman has undertaken the role of facilitating negotiations among private parties. A description of Chairman Richard E. Wiley's role in bringing the networks together to adopt a "family viewing" policy suggests the powerful influence that an FCC Chairman may have in initiating negotiations by virtue of the power that resides in the chairman's office.

Wiley's involvement in this area reflected a sensitivity to Congressional concern over "excessive programming of violence and obscenity"[29] that was reaching millions of young viewers. The House Appropriations Committee[30] had ordered the FCC to submit a report "outlining specific positive actions taken or planned by the Commission to protect children"[31] from such programming.

In October, 1974, several months before the report was due, Chairman Wiley utilized the bully pulpit by urging the broadcast industry to respond "to the very legitimate concerns of congress . . . through intelligent scheduling, appropriate warnings and, perhaps, even some kind of industry rating program."[32] Wiley's strongest pronouncement came in his speech before the Illinois Broadcasters Association where he gave a forthright assessment of what options were available: "If self-regulation does not work, governmental action to protect the public may be required—whether you or whether I like it."[33]

Representatives from the three commercial networks met a little over a month later to discuss the problem, including the possibility of self-regulation through the National Association of Broadcasters ("NAB") Code.[34] What surprised some of the rep-

---

29 H.R. REP. No. 1139, 93d Cong., 2d Sess. 15 (1974), *cited in* Geller & Young, *Family Viewing: An FCC Tumble From The Tightrope?*, 27 J. COMM. 193, 194 (1977) [hereinafter Geller & Young]. This year marks the fifth consecutive year that the House Appropriations Committee has an effect upon children's viewing. *Id.*

30 The House Appropriations Committee is responsible for doling out government funds to the various offices and agencies of the federal government. In this context, it wanted to see the FCC's record on this issue in order to determine the proper allocation of funds.

31 Geller & Young, *supra* note 29, at 194.

32 *Id.*

33 *Id.* Wiley's prior statement, "that it may lie beyond the Commission's constitutional and statutory authority to act on this issue of program content," was substantially weakened by his latter statement. *Id.*

34 The NAB Television Code began in 1952 to provide "broadcasters with guidelines for meeting their statutory obligation to serve the public interest." S. BROTMAN, THE TELECOMMUNICATIONS DEREGULATION SOURCEBOOK 32 (1987). The Code was designed to set forth a variety of self-regulatory standards governing television programming and advertising. By the 1970's, the majority of all commercial television stations in the

resentatives, however, was the unusual aspect of this summit meeting—the central role played by Chairman Wiley and his staff.

Chairman Wiley brought a list of specific proposals into the meeting. He sought a "new commitment" reducing portrayals of sex and violence on television. These proposals included the following: 1) programs inappropriate for viewing by children would not be broadcast prior to 9 p.m.; 2) warnings about the nature of the subject matter would be aired at the outset of an "adult" program, at the first commercial break, and possibly during the program itself, with a white dot in the corner of the screen; and 3) the networks would furnish affiliates with advance notice of "adult" programs so that affiliates would be able to provide appropriate warnings for inclusion in the local television listings.[35]

By December, 1974, Chairman Wiley had dispatched FCC staff members to the networks' standards and practices offices in New York. These meetings were intended to "convince the networks to formulate and adhere to a single policy embodying the Wiley proposals."[36] Later that month, CBS President Arthur Taylor wrote to the NAB announcing that his network planned to banish "adult" programming from the first hour of prime time. NBC and ABC soon followed with similar pronouncements.[37]

Chairman Wiley, concerned about the Commission's February deadline for issuing its report to Congress, convened another meeting of top network representatives in January, 1975. He sought to obtain a specific commitment that the NAB Code would be amended quickly to embody the family viewing concept. In early February, the NAB Television Code Review Board approved a resolution for such an amendment and followed Wiley's additional suggestion that the family viewing period be extended to the hour preceding the first hour of prime time.[38] Thus, the Commission was able to report to Congress that the self-regulatory action "obviate[s] any need for governmental regulation in this sensitive area."[39]

United States subscribed to the Code, and thus could display the "NAB Television Seal of Good Practice." *Id.* at 32-33.

35 Report on the Broadcast of Violent, Indecent and Obscene Material, 51 F.C.C.2d 418, 420-21 (1975).

36 Geller & Young, *supra* note 29, at 195.

37 *See* G. COWAN, SEE NO EVIL 100-115 (1979). The family hour became synonymous with Taylor; it was believed "that it would lead to the reduction of violence on television." *Id.* at 115.

38 Report on the Broadcast of Violent, Indecent and Obscene Material, 51 F.C.C.2d at 421 (proposal meant to be effective as of September, 1975).

39 *Id.* at 422.

Wiley's desire to have the FCC respond to Congressional pressure was satisfied. The industry, as a result of his aggressive prodding, had emerged with a concrete response to a widespread societal concern. Publicity had forced the industry to develop a solution to the problem, and Arthur Taylor's initiative, implicitly supported by Wiley, represented the breakthrough that led to the NAB Code amendment.

Chairman Wiley proceeded to assume the role of emissary to other industry groups as well—namely, independent stations and public broadcasters—in order to ensure that the family viewing concept would be, if at all possible, industry-wide. He assigned his assistant, Lawrence Secrest, to review a draft document of the Public Broadcasting System ("PBS") regarding its approach to family viewing. When PBS responded with a letter that stopped short of adopting the 9 p.m. line of demarcation, Wiley then contacted PBS President Hartford Gunn. Shortly thereafter, PBS amended its original response to include a specific reference to programming adult themes after 9 p.m.[40]

Chairman Wiley also told Herman Land, President of the Association of Independent Television Stations, that he was obliged to report to Congress what the independent stations would be doing to promote family viewing. Soon thereafter, the independent stations accepted the family viewing proposal, provided that a grandfather clause be added to allow them to use programming that already had been purchased.[41]

Since Chairman Wiley indicated that he believed the Commission had no statutory authority to promulgate an enforceable family viewing policy on its own,[42] the Commission was never put in the position of reviewing the merits of the policy under the Communication Act's own public interest standards. Once the private parties adopted their own enforcement through self-regulation, the Commission's role in the area was brought to an end.

Nevertheless, the Writer's Guild of America West and Tandem Productions brought suit against the Commission and the networks.[43] The plaintiffs charged that the FCC had intervened too actively to produce an agreement, and that the networks had acquiesced to the Chairman's suggestions because of a fear that

---

[40] Geller & Young, *supra* note 29, at 196-97.

[41] *Id.* at 196.

[42] *Id.* at 194.

[43] Writers Guild of America West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

Commission regulation might follow, absent consensus on self-regulation measures. The district court concluded that:

> 1) threats, influence, and pressure [by Chairman Wiley] caused the networks and the NAB to adopt the family viewing policy; 2) the FCC committed a *per se* violation of the First Amendment by exerting improper pressure on the networks; [and] 3) the FCC violated the Administrative Procedure Act(APA)[44] by implementing public policy by informal pressure instead of by complying with the Act's procedural requirements.[45]

On appeal, the district court's decision was vacated and remanded to the FCC by the Ninth Circuit.[46] The Ninth Circuit held that the matter should have been reviewed by the FCC before bringing it to the judiciary, noting, "[t]he [district] court's conclusions strike at the very core of the pervasive issue concerning the scope of the FCC's power in regulating broadcasting."[47] Those conclusions, according to the Ninth Circuit, also put at issue the technique of "jawboning, that under one name or another has long been in use in government generally."[48]

The Ninth Circuit found that the "serious issues" presented in the case could benefit from the "special competence" of the FCC.[49] "[W]e cannot believe that the ultimate judicial resolution of these issues will not be aided by the FCC's thorough consideration of them. Then, and only then, should courts step with even modest confidence into these sensitive and difficult areas."[50]

As to Chairman Wiley's negotiating activities, the Ninth Circuit panel commented:

> It is not surprising that the Commission often seeks to "chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media." . . . [I]nformal discussions between the Commission and members of the industry that lead to self-

---

44 The Administrative Procedure Act was introduced to provide greater uniformity of procedure and standardization of administrative practice among diverse agencies whose customs departed widely from each other, and to curtail and change practices embodying in one person or agency the duties of prosecutor and judge.

45 Writers Guild of America West, Inc. v. FCC, 609 F.2d 355, 358 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

46 *Id.*

47 *Id.* at 362.

48 *Id.*

49 *Id.* The court stated that "these are serious issues; yet both pertain to matters of great concern to the FCC and with respect to which it has special competence." *Id.*

50 *Id.* The court acknowledged that its reservations with regard to FCC holdings may be unfounded, given the Commission's "competence."

> regulation constitute but one aspect of the ongoing effort by both the government and the licensees to negotiate the regulatory "tightrope" on which they confront one another.[51]

Given the delicacy of this regulatory tightrope, the court ruled that deferring to the FCC before judicial review was the course that prior case law mandated.[52]

The Commission itself was given the last word on the matter,[53] which suggests that the courts are likely to defer to an FCC finding on the permissible scope of jawboning by a chairman or commissioner. In September, 1983, it released a report which concluded

> that the actions which formed the basis of the complaints against the Commission's former chairman and the other commissioners named in the complaint were neither unlawful nor improper. . . .
>
> . . . .
>
> . . . It is our judgement that the Commission under Chairman Wiley acted properly in its attempt to focus the broadcast industry's attention on excessive violence and sex on television and to urge improved industry self-regulation to forestall the demand for governmental action.[54]

The FCC concluded that the networks were neither coerced nor intimidated by Chairman Wiley's activities. The networks' decision to support a family viewing policy was found to reflect their independent judgment of the best course for their companies, in light of the many pressures they faced to do something about a widely perceived problem.[55]

2. Children's Television

The FCC has been confronted with the controversy surrounding the children's television policy for the past seventeen

---

[51] *Id.* at 364. The Court quoted *CBS v. Democratic Nat'l Committee*, 412 U.S. 94, 120 (1973), a case which dealt with the Democrats' attempt to force CBS to broadcast its editorial advertising beyond the requirements of the fairness doctrine. The court defined a "middle course," in which the FCC can balance its need for public accountability with private control of the media.

[52] *See Writers Guild*, 609 F.2d at 362. The FCC, like all administrative agencies, is given deference by the courts in certain areas because of its specific grant of power and obvious expertise in its domain.

[53] NAB TV Code, 95 F.C.C.2d 700, 701 (1983) (discussing the *Writers Guild* case in footnote 46).

[54] *Id.* at 701, 704. The decision noted that, according to the Court of Appeals' holding in *Writers Guild*, the Chairman's actions were within the powers of administrative agencies that are influenced by Congress and public opinion. *Id.* at 704-05.

[55] *Id.* at 710-12 (noting that Commissioners must be free to discuss policy with the public, citing Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1169, *cert. denied*, 447 U.S. 921 (1980)).

years. In early 1970, a group called Action for Children's Television ("ACT") submitted a formal proposal to the Commission on improving children's television. The submission was accepted as a petition for Rule Making,[56] and the FCC invited public comment on the ACT proposal. Nearly a year later, the FCC issued a combined *Notice of Inquiry* and *Notice of Proposed Rule Making* in order to conduct a more detailed study in the area and to formulate specific policies.[57]

The response to these notices, in the Commission's own words, was "overwhelming," as more than 100,000 comments were filed.[58] At the cornerstone of ACT's proposal were several changes in children's programming practices, including mandatory elimination of all sponsorship and commercial content, and a requirement that all television licensees provide a minimum amount of age-specific programming for children.[59]

In an apparent response, the broadcast industry undertook a limited program of self-regulation, reinterpreting and revising the Code of the National Association of Broadcasters to prohibit certain potentially deceptive programming and advertising practices.[60] Code changes included restrictions on host-selling;[61] mandated separations between programming and advertising

---

[56] Notice of Inquiry and Notice of Proposed Rulemaking, 28 F.C.C.2d 368 (1971). The ACT proposal included rules banning commercials on children's programs and setting up programming for age-specific groups in certain time slots.

Age	Time
Preschool: 2-5	7am-6pm daily 7am-6pm weekend
Primary: 6-9	4pm-8pm daily 8am-8pm weekend
Elementary: 10-12	5pm-9pm daily 9am-9pm weekend

The station would be required to show at least fourteen hours of children's programming per week, within this framework. *Id.*, para. 2.

[57] *Id.*, paras. 7-10. After hearing letters and pleadings from interested parties, the Commission ordered a more detailed investigation.

[58] Children's Television Report and Policy Statement, 50 F.C.C.2d 1, para. 4 (1974). The comments were of the following variety: formal pleadings, programming data from stations and networks, and informal expressions of opinion such as letters and cards. *Id.*, para. 4.

[59] *Id.*, paras. 2-3. *See supra* note 35, at 420.

[60] *See* Action for Children's Television v. FCC, 564 F.2d 458, 463 (D.C. Cir. 1977). The NAB acted after over 100,000 letters were filed in response to the Commission's request for comments on children's programming. The NAB was responding to these letters and the FCC's ensuing panel discussions, which showed the depth of public opinion on these issues.

[61] "Host-Selling" is the practice of having program talent, i.e. the actors or emcees, delivering commercials. *See* Children's Television Report and Policy Statement, 50 F.C.C.2d 1, para. 2 (1974).

content; prohibitions on advertisements for vitamins and drugs; and phased-in limitations that would reduce the amount of commercial advertising on children's television programs to nine and one-half minutes per hour on weekends and twelve minutes per hour during the week.[62]

These changes were negotiated in private meetings with FCC Chairman Richard E. Wiley after the final oral presentations in the Rule Making proceeding had taken place. Thus, ACT and the other participants in the rulemaking process did not have an opportunity to respond to the industry's assertions.[63]

In 1974, the Commission issued its Children's Television Report and Policy Statement that identified potential areas of improvement in children's television.[64] The FCC, however, explained that it would not be adopting specific rules governing children's television practices. It expressed uneasiness about becoming involved in detailed governmental supervision of programming because of first amendment concerns.[65] Instead, the Commission favored the self-regulation proposals of the NAB and the Association of Independent Television Stations, which had adopted comparable commercial time restrictions.

> The standards adopted by the two associations are comparable to the standards which we would have considered adopting by rule in the absence of industry reform. We are willing to postpone direct Commission action, therefore, until we have an opportunity to assess the effectiveness of these self-regulatory measures. . . .
>
> . . . .
>
> . . . If self-regulation does not prove to be a successful device for regulating the industry as a whole, then further action may be required of the Commission to insure that licensees operate in a manner consistent with their public service obligations.[66]

---

62 *Action for Children's Television*, 564 F.2d at 464. Soon after the NAB adopted these changes, the Association of Independent Television Stations ("AINTV") recommended similar charges to its members. *Id.*

63 *Id.* at 468.

64 *Id.* at 464. The Commission acknowledged broadcasters' special obligation to children and further noted the particular importance of educational programming. *Id.* at 465.

65 *Children's Television Report and Policy Statement*, 50 F.C.C.2d 1, para. 19 (1974). The Commission noted that it was the rights of its viewers and listeners, not those of broadcasters, which were paramount; therefore, they could not limit broadcasting too severely. *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Court held that it is critical that the public receive access to other ideas and experiences; the important rights were those of the viewers and listeners.

66 *See Action for Children's Television*, 564 F.2d at 466. *See also* 86 BROADCASTING 4 (June

The FCC subsequently amended its license renewal form to elicit information regarding advertising during children's programs, again underscoring its intention to closely monitor the self-regulation activities of the broadcasting industry.[67]

ACT was not satisfied with the FCC amendment, and petitioned to reconsider by adopting rules that would establish specific amounts and percentages of time to be dedicated to children's programming. ACT again pressed its proposal to have the FCC prohibit all advertising during or adjacent to programs designed for pre-school aged children. The Commission rejected this petition. With administrative remedies exhausted, ACT filed a judicial appeal to compel the Commission to promulgate specific rules along the lines it originally proposed in its petition for Rule Making.

ACT appealed on two grounds. It charged that the agency's failure to enact rules was arbitrary and capricious, and that its failure to solicit public comment on the industry's proposed reforms represented an "abuse of the administrative process" which rendered the extensive comment-gathering stage "little more than a sop."[68]

The District of Columbia Circuit Court of Appeals rejected both claims. The FCC, the court reasoned, could rely on self-regulation as a solution; the agency was not required to provide ACT with a chance to challenge the industry's self-regulatory proposals since there had been, on the whole, a "reasonable opportunity to [offer] comment[s] and [criticisms] . . . on the proposed rule."[69] The court concluded that the decision not to invite public comment on the industry proposals, although perhaps "impolitic," was within the Commission's discretion.[70]

In 1978, the Commission sought to reevaluate its commitment to the advertising guidelines for children's television that were implemented through the original self-regulatory actions.[71] The fol-

---

17, 1974); 87 BROADCASTING 22 (July 29, 1974); *Inside the FCC*, 25 TELEVISION/RADIO AGE 65 (May 8, 1978).

67 *See Action for Children's Television*, 564 F.2d at 467 (citing Memorandum and Opinion Order, 53 F.C.C.2d 161 (1975)).

68 *Id.* at 468.

69 *Id.* at 471.

70 *Id.* at 473. *See also* Washington Util. & Transp. Comm'n v. FCC, 513 F.2d 1142, 1165 n.31 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) (Court upholds FCC's finding that it would be contrary to public interest to limit entry into specialized communications field by holding comparative hearing on issues of economic exclusivity). *But see* Consolidated Rail Corp. v. United States, 567 F.2d 64, 83 n.66 (D.C. Cir.), *cert. denied*, 434 U.S. 954 (1977) (Wright, J., dissenting) (procedures adopted by the Commission in its proceedings found deficient; "[t]he Commission's . . . notion of a hearing encompasses 'a reasonable opportunity to know the claims of the opposing party and to meet them.'. . . [M]ore than a 'boxcars passing in the night' procedure would seem to be required.") *Id.*

71 Second Notice of Inquiry, 68 F.C.C.2d 1344, para. 22 (1978). The questions posed in this inquiry seek information in two broad areas: (1) an evaluation of the effec-

lowing year, after an extensive staff review of policy in the area, the FCC indicated that no changes in the status quo were warranted, again emphasizing the vitality of self-regulation as a policy tool.[72]

More recently, the Commission has initiated proceedings to abolish all quantitative commercial guidelines for broadcasters.[73] In 1984, the FCC ended commercial time limits because it found that "commercial levels will be effectively regulated by marketplace forces [and that] if stations exceed the tolerance level of viewers . . . the market will regulate itself."[74]

The television deregulation report did not mention commercialization of children's programming; this concern was only briefly addressed after the NAB asked for a clarification of the decision. The FCC said that commercial guidelines for children's programming had in fact been eliminated because of a "general de-emphasis regarding quantitative guidelines" and the Commission's recognition of "the importance of advertising as a support mechanism for the presentation of children's programming."[75]

ACT, as before, urged reconsideration, but was again unsuccessful in its attempt to have the Commission reverse course. A judicial appeal of the television deregulation order followed, and a decision was rendered in June, 1987.[76] The D.C. Circuit found that the FCC's actions failed "to unearth a 'reasoned basis' adequate to justify the [Commission's] termination of the children's commericalization guidelines."[77] The FCC's terse explanation, according to the court, was in stark contrast to the Commission's historic insis-

---

tiveness of the Commission's self-regulation policy, and (2) an asessment of alternatives to those policies adopted in 1974. *Id.*, para. 37.

72 Notice of Proposed Rulemaking, 75 F.C.C.2d 138 (1979).

> The Task Force found that broadcasters had . . . complied with the advertising guidelines [set forth in the 1974] *Policy Statement*, including:
>
> 1) non-program material time standards;
>
> 2) use of separation techniques between program content and commercial messages;
>
> 3) elimination of host-selling and tie-in practices. 50 F.C.C.2d at 6. In view of our staff's findings of general industry compliance with the FCC's current advertising guidelines, and their recommendation that we not at this [moment] pursue any changes in these guidelines, this notice addresses only the issue of television programming for children.

Id., para. 5.

73 Radio deregulation was approved in 1981. Deregulation of Radio, 84 F.C.C.2d 968 (1981). A comparable scheme for television was adopted in 1984. The Revision of Programming and Commercialization on Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, para. 1 (1984).

74 Revision of Programming, 98 F.C.C.2d, para. 67 (1984).

75 Memorandum Opinion and Order, 104 F.C.C.2d 358, para. 23 (1986).

76 Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

77 *Id.* at 745.

tence that the television marketplace did not function adequately for children's programming.

> The Commission has offered neither facts nor analysis to the effect that its earlier concerns over market failure were overemphasized, misguided, outdated or just downright incorrect. Instead, without explanation the Commission has suddenly embraced what had theretofore been an unthinkable bureaucratic conclusion that the market did in fact operate to restrain the commercial content of children's television.[78]

In other words, the court believed the long history of the FCC's separate policy treatment of children's programming could not be reconciled with a two line explanation of the elimination of guidelines in the Commission's reconsideration decision.

Although the NAB Code, including its children's television limits, had been abandoned in 1982,[79] the court remanded the case to the FCC with instructions that the Commission further elaborate on why it eliminated the long-standing children's television commercialization guidelines.[80]

3. Broadcaster-Citizen Group Agreements

Beginning in the late 1960s, the potential sanction of a petition to deny license renewal of a radio or television station created leverage for citizen group negotiations with broadcasters. The three agreements discussed below represent a range of broadcaster-citizen group agreements made under three different scenarios: petition to deny license renewal, petition to deny transfer, and threat to seek judicial appeal, respectively.[81] How-

---

[78] *Id.* at 746. *But see* Kunkel, *F.C.C. Upbraided For Children's TV Policies*, 113 BROADCASTING 66 (Aug. 3, 1987). This disputed the FCC's argument showing that "the marketplace has not maintained reasonable limits on nonprogram material aired during children's programs," and "that the FCC's 1984 decision to remove commercial content limits from children's programming led to a marked increase in commercial interruptions aired during children's programming in 1985." *Id.*

[79] The Code was abandoned in the aftermath of an antitrust suit initiated by the U.S. Department of Justice. The Justice Department charged that the Code's limitation on the number of minutes per hour a network or station could allocate to commercials, the number of commercials that could be broadcast in an hour and the number of products that could be advertised in certain types of commercials violated the Sherman Act. The court rejected the NAB's assertion that the Code was a mere set of advisory standards, and instead held that the Code had the force of a contractual obligation. *See* United States v. National Association of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982).

[80] *Action for Children's Television*, 821 F.2d at 745 (emphasizing that the court would refrain from making policy because "[u]nder basic principles of separation of powers [the court is] not to do the agency's work for it.")

[81] *See also* Los Angeles Women's Coalition for Better Broadcasting v. FCC, 584 F.2d 1089 (D.C. Cir. 1978) (petition to deny renewal of television license is contested because of substantial underemployment of women in workforce. Where further information is

ever, there exists no unified Commission policy about negotiations resolving these types of disputes.

The model for many citizen negotiations was the Texarkana agreement negotiated by the Office of Communication of the United Church of Christ.[82] Twelve civic associations in Texarkana, Texas, filed a petition to deny the license renewal of KTAL-TV, owned by KCMC, Inc. The petition alleged that the station did not present public service announcements for black or integrated groups; that the studio facilities had been moved away from the community; that the station deleted network programming of particular interest to black viewers; and that the licensee did not live up to the programming proposals of its previous renewal application.[83]

After filing the pleadings, the licensee met with the community coalition and its counsel. The negotiated agreement included provisions that KTAL-TV would employ at least two full-time black on-camera reporters; that the station would present regular programs discussing controversial issues featuring both black and white participants; and that station management would meet regularly with local groups and regularly announce on the air that the station would consult with any community group regarding community needs and taste.[84]

KTAL also agreed not to depart from any stipulations in the agreement without both consulting the affected groups in the service area and giving advance notice to the FCC by stating the reasons for departing from the agreement.[85] With completion of

---

needed, the FCC may either conduct its own inquiry or afford petitioner the opportunity to conduct discovery, but if the FCC chooses the first alternative, it must ensure that petitioner has the opportunity to examine and comment on the information received, and the full report of the FCC's investigation must be placed in public record and on reasonable time allowed for the response); Bilingual Bicultural Coalition on Mass Media v. FCC, 595 F.2d 621 (D.C. Cir. 1978) (petition to deny license renewal of KCBS radio results in requiring FCC to conduct further investigation in to the charges of racial discrimination by radio station, by any means it deems appropriate); Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59 (D.C. Cir. 1977) (appeal from an order of the Federal Communications Commission, which renewed without hearing licenses to operate certain radio and television stations, resulted in a requirement that FCC hold hearing); National Organization for Women v. FCC, 555 F.2d 1002 (D.C. Cir. 1977) (denying remand to petitioners who sought to reverse FCC grant of license renewal to WABC-TV, holding instead that FCC did not act unreasonably in holding that EEOC's probable cause finding concerning television station did not raise substantial and material questions of fact that would require an evidentiary hearing).

[82] In re Application of KCMC Inc., Texarkana, Tex. for Renewal of License of Station KTAL-TV Texarkana, Tex., 19 F.C.C.2d 109, 113 (1969), *modified*, 465 F.2d 519 (D.C. Cir. 1972).

[83] *Id.* at 121-22.

[84] *Id.* at 112-13.

[85] *Id.*

the agreement, the community coalition withdrew its petition to deny renewal and supported the renewal of KTAL. The FCC subsequently affirmed the agreement.[86]

Another major negotiated agreement involved the Citizens Communications Center ("Citizens"), a public interest communications law firm. In 1971, the firm negotiated an agreement with Capital Cities Broadcasting Corporation ("CapCities"), which was in the process of seeking Commission approval for the acquisition of radio and television stations owned by Triangle Publications, Inc.

Unlike the Texarkana agreement, the Capital Cities negotiations did not solely involve local community groups. Instead, Citizens intervened "as a representative of the television and radio audiences" in five affected markets, by filing a petition to deny the transfer of ownership.[87]

In order to remove this potential roadblock to a $110 million sale, CapCities pledged $1 million for a special "Minority Program Project" at three of the stations it intended to acquire. The agreement for special-interest programming also created advisory committees representing minority groups in order to establish budget priorities. The CapCities agreement is noteworthy because it was the first negotiated agreement in which a broadcaster made a monetary commitment to a programming project.

The broadcasting industry grew more defensive as petitions to deny spread to Chicago, Mobile, Memphis, Rochester, Atlanta, and Youngstown, Ohio.[88] As citizen groups became more aggressive in their demands, angry confrontations between community groups and broadcasters were not unusual.

By 1972, *Broadcasting* commented, "[t]he citizen group movement has entered a new era in the impact it is making on the broadcast-regulatory process—one in which the groups use the[ir] leverage . . . to enforce rules and policies when the FCC, in their judgment, has failed in that responsibility."[89]

Broadcasting's editorial was written to comment on negotia-

---

86 *Id.*

87 *A Spurt in the Price of Pacification*, 80 BROADCASTING 20 (Jan. 11, 1971). "CapCities proposed its 'Minority Program Project' in partial response to CCC's assertion that it had failed to satisfy a commission policy requiring it to make a 'compelling public-interest showing' to justify acquisition of the top-50 market stations included in the sale, WFIL-TV and WNHC-TV." *Id.*

88 *Up the Establishment: How to Play the New Game*, 80 BROADCASTING 20 (Jan. 11, 1971).

89 *McGraw-Hill Sets Record for Concessions to Minorities*, 82 BROADCASTING 25 (May 15, 1972). *See also* Schneyer, *An Overview of Public Interest Law Activity in the Communications Field*, 1977 WIS. L. REV. 619 (1977); Grundfest, *Participation in FCC Licensing*, 27 J. COMM. 85 (1977). "The Commission felt there was a danger that citizen groups would usurp

tions between McGraw-Hill, Inc. and a five-city organization of eight Mexican-American groups and one black group.[90] McGraw-Hill had agreed to purchase five television stations from Time-Life Broadcast, Inc.[91] The FCC approved the sale, even though three of the stations were in the top-50 markets. This contravened the FCC's then-existing policy of encouraging diversified ownership by preventing acquisition of more than two top-50 VHF stations unless a "compelling public interest showing" was made.[92] The FCC indicated that McGraw-Hill presented sufficient evidence to mandate a waiver, but the citizens' groups threatened to appeal the decision to the courts. With this possibility in mind, McGraw-Hill began negotiations with the Mexican-American and Black groups. The McGraw-Hill agreement was unique because of the number of parties involved, including community coalitions and lawyers representing individual groups.

McGraw-Hill, like CapCities, was faced with a contractual purchase deadline; delay in the form of an appeal would have nullified the contract and destroyed the sale. McGraw-Hill finally agreed not to purchase WOOD-TV, in Grand Rapids, Michigan, one of the three top-50 market stations in the original package.[93]

The agreement also established citizen advisory councils in each of the four remaining markets, as well as a national Minority Advisory Council that would coordinate the efforts of the local black and Chicano groups. McGraw-Hill also agreed to produce eighteen "La Raza" programs on Mexican-American history and culture that would air on all four stations, and thirty-six prime-time specials of minority programming in a three-year period, including twelve shows about black interests, twelve about Chicano interests and twelve locally-produced shows on minority cultural achievements.[94]

Minority employment levels were to be increased. Within three years, McGraw-Hill promised to have at least ten percent minority employees at each station, and at least fifteen percent of its total employees were guaranteed placement within sales, management or professional ranks within a year. One member of

---

some of the Commisions's own regulatory functions through the device of citizen settlement." *Id.* at 86.

90 *McGraw-Hill Sets Record for Concessions to Minorities*, 82 BROADCASTING 25 (May 15, 1972).

91 *Id.*

92 *Id.*

93 *Id.* at 26.

94 *Id.*

each station's three-member editorial board would also be a minority employee.[95]

During the early 1970s, activities in this area increased substantially. By June, 1975, the FCC's renewal branch faced a backlog of 250 petitions to deny.[96] Chairman Richard E. Wiley, in a speech before the National Conference of Black Lawyers, delivered the first public indication that the Commission was prepared to recognize broadcaster-citizen group agreements. He characterized the backlog of petitions to deny as representing, "in its very essence, a failure by someone to come to grips with the kind of broadcast service that we have in this country and the kind of service it should provide."[97] Chairman Wiley then called for "a better, more affirmative way" to resolve differences between citizen groups and broadcasters—namely, agreements produced by both parties.[98]

Within several weeks, the Commission took its first official step toward generally sanctioning broadcaster-citizen group agreements by issuing a *Proposed Policy Statement and Notice of Proposed Rule Making*.[99] In December, 1975, the FCC released a final *Report and Order*.[100] The Commission declared:

> One outgrowth of increased contact between licensees and their audiences has been informal negotiations and, in some cases formal agreements about aspects of station operations of concern to the community. However, we have found that some agreements attempt to yield licensee control to essentially private interests, contrary to the scheme of the Communications Act, which requires that the licensee alone must assume responsibility for ensuring that its station operates in the public interest.[101]

Accordingly, the FCC proposed to oversee these agreements, but in a limited way. First, if asked, the FCC would be available to make a determination as to "whether an agreement [was] contrary to applicable statutes, rules, or policies,"[102] but only if the parties chose to submit the agreement for review. Second, the Commission

---

95 *Id.* at 25-26.

96 *FCC Legitimizes Citizen Group Broadcaster Agreeements, Sees Them as a Way Out of Petitions-to-Deny Backlog*, 88 BROADCASTING 30 (June 2, 1975).

97 *Id.*

98 *Id.*

99 Agreements Between Broadcast Licensees and the Public, 58 F.C.C.2d 1129 (1975).

100 Agreements Between Broadcast Licensees and the Public, 57 F.C.C.2d 42 (1975).

101 *Id.*, para. 3.

102 *Id.*, para. 29.

would treat substantive agreement terms incorporated in a broadcast renewal application as representations of a promise for future performance.[103] The FCC also required broadcasters to make these agreements available to the public in the station's public inspection file.[104]

The Commission indicated that, wherever possible, it would construe these agreements in a manner favorable to their implementation; in the event of potentially differing interpretations, the FCC generally would not intervene by requiring parties to redraft their agreements.[105]

The Commission's clear preference has been to "leave citizens and licensees free to work out whatever arrangements they believe appropriate in their circumstances."[106] Moreover, the agency expressly declined to be cast in the role of a local mediator, since the agency has "neither the staff nor the financial resources to assume such a burden."[107] By articulating a necessarily flexible policy in this area, the Commission has indicated that responsible, good faith broadcaster-citizen group agreements would be treated on a par with commercial contracts negotiated by broadcasters.[108]

4. Daytime-Only Radio Station Operating Authority

Historically, the FCC has authorized daytime-only radio stations to operate only between local sunrise and local sunset. After initiating a *Notice of Proposed Rule Making and Notice of Inquiry* designed to explore possible steps that could expand such limited operating authority,[109] the Commission adopted a *Report and*

---

103 *Id.*

104 *Id.*, para. 8. "There was no dispute with the proposed amendment to Section 1.526 of our rules to require local filing of citizen agreements, but considerable comment about what additional measures, if any, should be required." *Id.*

105 *Id.*, para. 25.

106 *Id.*, para. 26.

> Citizens in a station's service area can make valuable contributions to broadcasting by communicating to the station licensee their perceptions of what the public interest requires. Licensees, for their part, have an obligation to seek out citizens' views, weigh them, and propose programming and operating practices to serve the public interest. The Commission's role is to establish procedures to facilitate these processes.

Id., para. 35.

107 *Id.*

108 It is also worth noting the parallel of such a negotiation-oriented philosophy in the commercial realm. *See* Subscription Agreements Between Radio Broadcast Stations and Musical Format Service Companies, Notice and Inquiry, 56 F.C.C.2d 805 (1975).

109 *See* Daytime AM B/C Station, Memorandum Opinion and Order, 99 F.C.C.2d 1087, para. 2 (1984). The Commission had authorized the pre-sunrise operation years earlier but during the present proceeding, additional rule changes were adopted enlarging the opportunities of the pre-sunrise operation. *Id.*, para. 2 n.2.

Order[110] amending its rules. Both Class II (clear channel) and Class III (regional channel) daytime-only stations would be permitted to operate two hours beyond local sunset with a maximum power of 500 watts. However, the precise period of operation and power for Class II stations would vary according to applicable interference requirements.[111]

The Daytime Broadcasters Association ("DBA"), a trade association representing daytime-only stations, supported the FCC's decision, but sought reconsideration. In practice, the Commission's decision would require Class III stations to limit their power to avoid interference.[112] DBA suggested that periodic recalculations or average calculations be used during the post-sunset period in order to permit greater operational flexibility.[113]

The other major interested party, the Association for Broadcast Engineering Standards ("ABES"), opposed the DBA's filing by arguing that the FCC had provided ample leeway to the daytime-only stations through authorization of post-sunset operations.[114] DBA filed a supplement to its petition for reconsideration, requesting that maximum power levels be allowed for all Class III stations, regardless of interference, until 6:30 p.m. local time.[115]

After reviewing this additional material, the FCC indicated that it would adopt a new method that it believed would lead to substantial increases in power without leading to excessive interference. Under this method, power for the first hour after sunset would be calculated at the middle of the hour, and the increased power could be used until 6:00 p.m. local time.[116]

---

110 47 C.F.R. § 73.99 (1987). The Report and Order amending § 73.99 as adopted at 48 Fed. Reg. 42,944 (1983).

111 Daytime AM B/C Station, Memorandum Opinion and Order, 99 F.C.C.2d 1087, para. 2 (1984). The 500 watt maximum granted to Class III daytime-only stations was also subject to reduction as necessary to avoid interference. *Id.*

112 The Commission mandated a " 'worst-case' approach [which involves making permissible power calculations] at the end of the two-hour post-sunset period when the potential for interference is at its maximum." *Id.*, para 2 n.4.

113 *Id.*, para. 4. DBA alleged that the new rules regarding the power Class III stations could use in order to avoid interference "were excessively technical and imposed excessive restrictions on these stations." *Id.*

114 *Id.*

115 *Id.*, para. 5. DBA argued that under their proposal, these Class III stations would be in the same position as they were during the pre-sunrise period when use of 500 watts starting at 6:00 a.m. was permitted regardless of interference to co-channel U.S. stations. DBA claimed no reason existed "for treating the pre-sunrise and post-sunset periods differently, since their signal propagation conditions are quite similar." *Id.*

116 *Id.*, para. 8. Calculating power at the middle of the hour "was intended to balance the excess of protection afforded during the first half of the period by the partial protection afforded during the second half of the period." *Id.*

The ABES asked the FCC to reconsider its revised rules, arguing that these rules would still permit "substantial interference to the continued reception of full-time stations."[117] Moreover, ABES asked the FCC to stay its new rules pending reconsideration.[118]

The DBA then sought an extension of time to permit it to explore the possibility of a settlement with ABES. The two groups initiated extensive discussions that led to a compromise solution regarding post-sunset power limits for Class III daytime-only stations. A joint motion to terminate any further action was submitted to the Commission.[119]

"Paramount to the consideration of the parties," the joint motion emphasized, "was the concern that settlement provide a solution that is mutually acceptable, that will maximize service to the public, minimize interference to full-time stations, and which can be implemented in time for the shortened days of Winter 1984-85."[120] The core of the compromise proposal was a group of engineering exhibits accompanying the joint motion. They indicated that it was possible to create substantially less interference relative to the revised rules while increasing power limits and using a more complicated system of power limits and power levels.[121]

Despite this greater complexity, the Commission indicated that the proceeding's history made it "all the more important to explore all avenues of resolution."[122] On balance, the Commission stressed that the most important consideration was

> to put the vexing issues involved in this proceeding to rest. As our two earlier decisions made clear, there are compelling reasons which can be advanced to support the needs of both daytime-only and full-time stations. Since it is not desirable to follow either position to the exclusion of the other, some middle ground must be found.[123]

---

117 *Id.*, para. 9. ABES argued that the Commission had originally rejected this type of interference, and that the only possible justification for allowing the interference was the economic benefit daytime-only stations would receive. This, ABES asserted, "ignored the economic loss that would result to full-time stations." *Id.*

118 *Id.*, para. 9 n.5 (DBA opposed stay of the new rules).

119 *Id.*, para. 11.

120 *Id.*, para. 12.

121 ABES and DBA conceded that to lessen interference while increasing power limits would prevent the increased power limits from being as high as the FCC had allowed upon reconsideration. *Id.*

122 *Id.*, para. 13 (even though the joint motion involves "greater complexity for the licensee and increased administrative burden" upon FCC).

123 *Id.*, para. 14. The Commission noted that the problem arose "because there is no obviously appropriate point at which to draw the line." *Id.*

The Commission acknowledged that it could have attempted to strike a balance on its own, but stated:

> it is clearly preferable to follow the industry-wide compromise position. . . . Our review convinces us that both in policy terms and in engineering particulars, the parties have proposed a sound basis for resolving the conflicting considerations here involved. . . . Therefore, we shall adopt the compromise and shall issue the necessary authorizations promptly.[124]

B. *Cable Television*

1. Basic Cable Policy Development

The FCC, under the leadership of Chairman Dean Burch—who became chairman in 1969—sought to end a freeze on cable television development that the agency had imposed in 1968.[125] The Commission felt the best way to proceed was by initiating an expansive rulemaking proceeding in the area. "The Commission's purpose," noted former FCC General Counsel Henry Geller, "was to integrate cable television into the national communications system, but to do so without destroying or undermining other elements of that system that were also serving the public interest."[126]

According to Dean Monroe Price, both the *Notice of Inquiry* and *Notice of Proposed Rule Making* "cast an extraordinarily wide net, asking interested parties to respond to issues on a quite fundamental, even philosophical plane. The Commission appeared open for rational discussion and expressed its hunger to obtain whatever data and analyses it could to facilitate the promulgation of appropriate rules."[127] Thus, the Commission extended itself beyond the formal requirements of the Administrative Procedure Act by conducting several days of oral presentations featuring panelists who represented conflicting viewpoints.[128]

---

[124] *Id.*, paras. 14, 16. It should be noted that this *Memorandum Opinion and Order* also dissolved a stay of the adopted rules that had been issued by order of James McKinney, Chief of the Mass Media Bureau. 49 Fed. Reg. 47,395 (1984). The stay was issued to allow the Commission to conduct its own computer analysis of the impact adoption of the joint proposal would have.

[125] *See* D. LEDUC, CABLE TELEVISION AND THE FCC 137-83 (1973).

[126] H. Geller, Case Study — 1972 Cable TV Rules (1977) (on file at the Washington Center for Public Policy Research, Washington, DC). This is an unpublished manuscript commissioned by the Cable Television Information Center of the Urban Institute, Washington, D.C.

[127] Price, *supra* note 11.

[128] H. Geller, Case Study — 1972 Cable TV Rules (1977), *supra* note 126, at 14.

The cable industry, buttressed by the Supreme Court's holding that cable carriage of distant broadcast signals was beyond the scope of the 1909 Copyright Act,[129] represented one coalition. It sought to preserve unrestricted use of these signals. If remedial measures were to be fashioned to protect broadcasters, upholders of cable interests believed that the remedial measures should be narrowly drawn on an *ad hoc* basis.

Broadcasters, representing the second coalition, raised the issue of "siphoning," a concept positing that unrestricted signal carriage by cable would fragment the audiences of local stations and thus divert advertising revenues from them. Absent these revenues, the argument went, broadcasters would not be able to sustain their statutory mandate to provide local programming.[130]

The third industry coalition consisted of copyright owners. The owners, like the broadcasters, opposed unrestricted cable carriage of over-the-air signals. They felt some protection was necessary to ensure that the exclusive right of distribution they had granted to broadcasters would remain in place.[131]

Henry Geller, the former FCC General Counsel, stated

> the various industries pushed their own plans, the broadcasters generally supporting plans that would restrict cable development; the copyright owner urging the need for full copyright liability in the top markets but willing to supply needed services in smaller markets on a compulsory licensing basis; and the cable industry urging relaxation of present restraints.[132]

After the rulemaking information was gathered, the decision-making began. Unlike most Commission proceedings, the process primarily involved the Commissioners themselves rather than staff members at the bureau level. After a period of "horse trading," a potential solution emerged that would limit the number of distant signals according to market size; in return, the cable industry would have been required to provide channel capacity for public and

---

129 *See* Teleprompter Corp. v. CBS, 415 U.S. 394 (1974) (importation of "distant" broadcast signals from one community into another does not constitute a "performance" under the 1909 Copyright Act; therefore, CATV operators are not subject to copyright infringement liability); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 396-401 (1968) (owner-operator of CATV systems only enhances viewers' capacity to receive broadcast signals and does not "perform" programs that its systems receive and carry; therefore, owner-operator is not subject to copyright infringement liability).

130 D. LEDUC, *supra* note 125, at 137-38.

131 *See* Brotman, *Cable Television and Copyright: Legislation and the Marketplace Model*, 2 HASTINGS COMM/ENT L.J. 477, 478-80 (1980).

132 H. Geller, Case Study — 1972 Cable TV Rules (1977), *supra* note 126, at 16.

leased access, and some limited free access for governmental and educational use.[133]

The interests of the copyright owners, despite their distinct interest in having syndicated programming protection, were not reflected in this proposal. Chairman Burch, however, became concerned that the copyright owners had been left unprotected, and sought to devise an agreement with the three parties themselves.

After the trade press leaked details of the FCC's tentative decision, the Commission confirmed the account in a letter of intent to the House and Senate Subcommittees on Communications.[134] Senate Subcommittee Chairman John Pastore reacted angrily:

> After we have heard the members of the Commission we are going to go into conference and decide that question. If we are satisfied the matter ought to be left the way it is going along, that is going to be the decision. On the other hand, if some other action has to be taken, we will let you know in due time.[135]

Burch had staked out a pro-cable position in his negotiations with fellow Commissioners,[136] and thus lacked the credibility to mediate among the parties after Congressional pressure caused the original plan to collapse. Thus, the task of crafting a meaningful consensus was shifted to White House Office of Telecommunications Policy ("OTP") Director, Clay T. Whitehead.[137]

Whitehead assumed his third-party role by convening a meeting among broadcasters, the cable television industry and copyright owners. As a result of this December, 1971 meeting, the three economic interests produced a *Consensus Agreement* that was adopted by the FCC in 1972.[138] The Agreement afforded relief to the copyright

---

133 *Id.* at 21-22.

134 *See* Cable Television Report and Order, 36 F.C.C.2d 260 (1971). "Our basic objective is to get cable moving so that the public may receive its benefits and to do so without, at the same time, jeopardizing the basic structure of over-the-air television." *Id.* at 262. Commissioner Wells dissented on the ground that "a segment of the action taken by the majority represents another example of over-regulation at the Federal level." *Id.* at 279.

135 *See* H. Geller, Case Study — 1972 Cable TV Rules (1977), *supra* note 126, at 21.

136 *See generally* R. BERNER, CONSTRAINTS ON THE REGULATORY PROCESS: A CASE STUDY OF REGULATION OF CABLE TELEVISION (1976).

137 Whitehead succeeded in the second compromise attempt after Burch had failed. Whitehead's success may be attributed to two factors:

> First, he obtained from Burch an endorsement of the proposed compromise. . . . Second, he put forth his proposed compromise to the industry groups on a take-it-or-leave-it-basis. . . . Given the choice between the consensus agreement and the possibility that no lifting of the "freeze" would occur, the [National Cable Television Association] agreed to compromise.

Id. at 46.

138 Cable Television Report and Order, 36 F.C.C.2d 143, app. D (1972).

owners by allowing program syndicators to enter into exclusive contracts for distribution by individual television stations, thus preventing simultaneous cable carriage that could reduce the value of what the syndicators were selling.[139] It also set forth a scheme for distant signal importation that satisfied both cable and broadcasting interests.[140] In the top 50 markets, for example, cable systems would be able to import distant broadcast signals subject to an upper limit that would allow them to offer three network-affiliated stations and three independent stations to their subscribers.[141]

The parties focused on long-term goals as well; all pledged to work cooperatively to devise revisions to the copyright law that were necessary in light of the existing Copyright Act's obsolescence. Four years later, this goal was realized through the enactment of new legislation that set forth a compulsory license system to cover the importation of distant broadcast signals by cable operators.[142] Unlike many Commission proceedings, the *Consensus Agreement* ensured speedy implementation since no participant sought further judicial review of the Rule Making.[143]

Even though non-industry representatives were not part of the bargaining process that produced the *Consensus Agreement*, their presence was evidenced by the extensive comments and replies they filed during the proceeding. The retention of the substantive requirement that mandated minimum channel capacity and various access channels for all new cable systems satisfied those parties with no direct financial interest at stake, such as consumer groups and municipalities. The absence of judicial appeal by these participants underscores the positive perceptions of both procedure and outcome.

---

139 The Commissioners adopted the Consensus Agreement by a 3-2 vote with Commissioner Johnson concurring in part and dissenting in part. *Id.*

140 *Id.*, paras, 92-93.

141 *Id.*, para. 74. These allowances would be subject to leapfrogging restrictions.

142 Brotman, *supra* note 131, at 480.

143 In *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979), the petitioner argued that the Commission could no longer adhere to its cable rules, since they were adopted on the premise that

> they served [the] public interest solely because they reflected a consensus agreement entered into by affected parties as a basis for seeking modification of copyright laws. . . . [S]ince that modification occurred, [the petitioner argued that the rules could not maintain their validity on the] basis of the consensus agreement without a showing that they served [the] public interest in some other manner.

Id. at 973. The Court of Appeals agreed. It vacated the Commission's Order and remanded the case to the Commission for further proceedings. Ultimately, however, the FCC upheld its action in the 1972 Order and found that no changes in the cable rules were necessary "to eliminate the remnants of the 'Consensus Agreement.' " Revision of Cable Television Regarding Leapfrogging Carriage of Local, Independent Signals, and Non-Network Programming Exclusivity, 87 F.C.C.2d 580, para. 19 (1981).

2. Pay Cable Policy Development

Shortly after the *Consensus Agreement* was approved, the FCC initiated a Rule Making proceeding to address pay programming on cable television. Unlike the earlier proceeding, this Rule Making cannot be characterized as a "textbook example of good [R]ule [M]aking"[144] because the FCC openly invited participants to go beyond the formal notice and comment process.[145] Rather than working toward a consensus, the FCC welcomed industry lobbyists to make private presentations after all comments and replies had been filed, thus leaving other Rule Making participants with no opportunity to respond. The subsequent rules produced by the Commission[146] appeared to be an adequate compromise, but in reality, lacked legitimacy because the core parties had not achieved any consensus themselves, and because others perceived the decisionmaking process as unfair.

It was not surprising, therefore, when Home Box Office, the leading pay cable service, filed a judicial appeal.[147] Citizens' group activists also intervened. Consequently, policy formulation in pay cable was frozen for two years while the appeal was pending.

The D.C. Circuit's decision in *Home Box Office* effectively stripped the Commission of any further role in the area by concluding that "the [pay] cable rules were in excess of the FCC's statutory authority, unsupported by the record, inconsistent with the first amendment, and more expansive than necessary to further the asserted government interest."[148] The government interest purportedly served was the prevention of "competitive bidding between operators of cable systems" and "free television."[149]

---

144 Price, *supra* note 11, at 553.

145 The FCC's two notices of proposed rulemaking in this proceeding stated: "In reaching a decision in this matter, the Commission may take into account any other relevant information before it, in addition to the comments invited by this *Notice*." Notice of Proposed Rule Making, 35 F.C.C.2d 893, 899 (1972); Further Notice of Proposed Rule Making, 48 F.C.C.2d 453, para. 32 (1974). In contrast, where the Commission specifies a prohibition of *ex parte* contacts, its Notice of Proposed Rule Making states: "All submissions by parties to this proceeding or persons acting on behalf of such parties, must be made in written comments, reply comments, or other appropriate pleadings." Notice of Proposed Rule Making, Table of Assignments, FM Broadcast Stations (Bangor, Maine), 40 Fed. Reg. 2828, 2829 (1975).

146 *See* 47 C.F.R. §§ 73.643, 76.225 (1975).

147 Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978). Judge Weigel concurred on the ground that "the [FCC] lacks the power to control the content of programs originating in the studios of cablecasters." *Id.* at 61.

148 *Id.* at 13, 14.

149 Note, Ex Parte *Contacts in Informal Rulemaking*: Home Box Office, Inc. v. FCC *and* Action for Children's Television v. FCC, 65 CALIF. L. REV. 1315, 1317 n.17 (1977). *See*

3. Cable Television Pole Attachment Policies

Cable television operators must generally rent space on utility poles, ducts or conduits for their cables and equipment. These poles are typically owned by telephone and electric power utility companies, often under a joint use or ownership agreement. This has placed utility companies in a particularly strong position to set the rates, terms and conditions for these leases. As a result, conflicts have arisen over the costs that cable operators should bear for the use of these facilities.

Congress sought to resolve this problem, and in 1978, the Communications Act was amended to include the Pole Attachment Act of 1978.[150] It directed the Commission to regulate the rates, terms and conditions for pole attachments and to ensure that they were just and reasonable. Congress intended the FCC to "institute a simple and expeditious . . . program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[151] The Act required the Commission to "adopt procedures necessary and appropriate to hear and resolve complaints concerning [pole attachment] rates, terms and conditions."[152]

In May, 1978, the Commission issued a *Notice of Proposed Rule Making*,[153] seeking comments on its proposed rules and on "the adoption of substantive guidelines which might provide direction to utilities and cable television system operators, encourage settlements, and help to resolve complaints fairly and expeditiously."[154] It specified that "[a]ppropriate guidelines should assist parties in reaching mutually satisfactory rental agreements and should help simplify and expedite the Commission's consideration of pole attachment complaints in a manner consistent with fair regulation."[155]

The Commission explicitly stated its preference that the par-

---

generally R. NOLL, M. PECK & J. MCGOWEN, ECONOMIC ASPECTS OF TELEVISION REGULATION 129-50 (1970); Posner, *The Appropriate Scope of Regulation in the Cable Television Industry*, 3 BELL J. ECON. & MAT. SCI. 98, 105-06, 118-23 (1972).

150 47 U.S.C. § 224 (1982) [hereinafter Pole Attachment Act].

151 S. REP. No. 580, 95th Cong., 1st Sess. 21 *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 109, 129.

152 Pole Attachment Act § 224(b)(1). The complaint must satisfy certain jurisdictional requirements, *inter alia*, that the State within which the pole attachment complaint arises does not regulate pole attachments. *Id.*, § 224(c)(1).

153 Adoption of Rules for the Regulation of Cable Television Pole Attachments, 68 F.C.C.2d 3 (1978).

154 *Id.*, para. 3.

155 *Id.*, para. 12.

ties attempt to solve any conflicts among themselves before turning to the FCC for formal resolution.

> Generally, we would expect that the parties will make reasonable efforts to resolve potential disputes before filing complaints, and the proposed rules require, in particular, that the complaint indicate the steps taken to obtain necessary information from a utility, where the complainant claims the information was not provided upon request.[156]

The Commission indicated that it would determine whether the rate, term, or condition complained of was just and reasonable, based upon a review of pleadings and internal guidelines.[157] The Commission, however, did not intend for this process to approach the complexity of common carrier regulation. In proclaiming its objective of "a regulatory program for pole attachment matters far simpler than that used to regulate common carriage,"[158] the FCC emphasized its intention to achieve a simple procedure that facilitated negotiated settlements.

The Commission issued its *First Report and Order*[159] in 1978, adopting rules and procedures for the resolution of cable pole attachment complaints. The following year, it issued its *Second Report and Order*,[160] which adopted substantive rules and implemented additional procedures. Several parties, including AT&T, the National Cable Television Association ("NCTA"), and the U.S. Independent Telephone Association, petitioned for reconsideration of the rules and procedures adopted in the *Second Report and Order*.[161] They took issue with three specific determinations, but the Commission found "no basis to modify significantly the procedures adopted in the *Second Report*."[162]

Although the Commission continued to recognize the importance of negotiated settlements, it noted the problem of the utilities' monopoly position, which resulted in unequal bargaining power between the parties. Accordingly, the Commission recognized that in

---

156 *Id.*, para. 5.

157 *Id.*, para. 8.

158 *Id.*, para. 28.

159 Adoption of Rules for Regulation of Cable Television Pole Attachment, First Report and Order, 68 F.C.C.2d 1585 (1978).

160 Adoption of Rules for Regulation of Cable Television Pole Attachment Memorandum Opinion and Second Report and Order, 72 F.C.C.2d 59 (1979), *modified*, 77 F.C.C. 2d 187 (1980).

161 *Id.*, para. 2.

162 Adoption of Rules for the Regulation of Cable Television Pole Attachment, Memorandum Opinion and Order, 77 F.C.C.2d 187, para. 2 (1980).

some situations, specific rates for pole attachments should be mandated.

> [W]here experience has shown that cable television may not be able to bargain with the utilities on an equal arms-length basis, it is important that we be able, where necessary, to provide a suitable remedy through exercise of the prescription power. In other words, merely ordering parties to negotiate or, alternatively, issuance of an order to cease and desist from charging unlawful rates may not be the most effective means to insure prompt implementation of the lawful rate that the statute plainly intends.[163]

More recently, the Commission issued a *Notice of Proposed Rule Making*,[164] in response to an appellate court determination that the "Commission's methodology did not result in the calculation of the maximum just and reasonable rate allowable under the [Communications] Act and that the Commission had not adequately explained its rationale."[165] In proposing a new formula to calculate an appropriate rate, the Commission noted that "this rate should be predictable and retain the level of certainty which in the past has yielded a significant volume of negotiated settlements relying on Commission standards."[166] It concluded:

> It is in the interests of both the utility and the cable company to resolve disputes without resorting to a complaint before the Commission. Our rules were designed to enable the parties to calculate a just and reasonable rate using our guidelines, which will be amended pursuant to this proceeding in a manner to assure that parties have clear guidance on the likely result of a Commission decision.[167]

Throughout the pole attachment proceedings, the Commission stressed its preference for negotiated settlements. It promulgated rules that were structured to encourage and facilitate negotiations

---

163 *Id.*, para. 25.

164 Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Notice of Proposed Rule Making, 104 F.C.C.2d 412 (1986).

165 Alabama Power Co. v. FCC, 773 F.2d 362 (D.C. Cir. 1985).

166 Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 104 F.C.C.2d 412, para. 23 (1986).

167 *Id.*, para. 30. In July 1987, the Commission released a Report and Order adopting rules and procedures for cable television hardware attachment to utility poles and reiterating the importance of negotiated agreements. "[A]ny settlement that is agreed to by all the parties will serve as precedent to resolve complaints which otherwise would have been resolved on a more time consuming, case-by-case basis." Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order, 2 F.C.C. Rcd. 4387, 4398, para. 78 (1987).

among the parties, with the complaint process serving as a final alternative. The FCC said:

> An important attribute of the Commission's pole attachment program has been that the parties can compute the rate themselves without the necessity of filing a complaint before the Commission. This has facilitated negotiations and settlements among the parties either after complaints have been filed or before the dispute reached the level of a formal complaint since both parties knew what the Commission's determination would be. We expect any revisions to our formula and policies to have the same degree of certainty that would encourage settlements.[168]

4. Revising the Must-Carry Rules

In 1985, the District of Columbia Circuit Court of Appeals invalidated the FCC's long-standing rules requiring cable carriage of local broadcast signals.[169] The rules were struck down as a violation of the first amendment. However, the court explicitly welcomed narrower approaches that could pass constitutional muster if the Commission elected to propose them.[170]

Prodded by congressional pressure, the FCC decided to revisit the issue through a new *Notice of Inquiry and Notice of Proposed Rule Making*.[171] By then, it had become apparent that the broadcast lobbyists on Capitol Hill were mustering considerable support for reimposition of must-carry rules in some reduced form.

Without significant leadership from the Commission, the major parties in interest met with their own memberships to discuss possible alternatives. Broadcast and cable associations initiated a series of face-to-face discussions, beginning in October, 1985.

The talks began with great apprehension, in part because the parties were not getting any signals from the FCC about how it would view an industry consensus agreement. NCTA President James Mooney said the initial meeting was "not a negotiation."[172] "I don't believe that the ball is necessarily in my court,"

---

168 Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 104 F.C.C.2d 412, para. 12 (1986).

169 *See* Quincy Cable T.V., Inc. v. FCC, 12 Media L. Rep. (BNA) 1001 (D.C. Cir. 1985) [hereinafter *Quincy-Turner*].

170 *Id.* at 1024.

171 *See Must Carry: The Summitry Begins*, 109 BROADCASTING 39 (Oct. 28, 1985).

172 *Id.* The meeting between broadcasters and the NCTA marked their first official discussion regarding the must-carry rules since the *Quincy-Turner* court declared the rules to be unconstitutional.

he told the trade press. "They [the broadcasters] have a problem."[173]

The first industry meeting established an unfortunate precedent because it clearly omitted a significant interest in the must-carry controversy — public television stations. This omission raised doubts about the legitimacy of any industry compromise which, in turn, lessened the FCC's confidence that industry negotiations could produce an outcome justifiable on "public interest" grounds under the Communications Act.

At the Commission, a parallel process was taking place as Chairman Mark Fowler sought to craft a consensus on the issue among his fellow Commissioners.[174] In effect, the industry players and the FCC — both essential parts of the equation — were competing to come up with the better agreement. Like the industry meetings, the Commission's internal deliberations were, according to trade press reports, "shrouded in an almost paranoid secrecy."[175]

The FCC pursued its traditional approach of giving a little to each side, but less than any party desired. The core of the Commission's proposal—mandating an A/B switch to allow cable viewers access to over-the-air signals—had already been dismissed as an inappropriate solution by cable operators and broadcasters during their meetings.[176] Consequently, it was difficult for the Commissioners to argue that a satisfactory outcome had been achieved in this area. Instead, they offered statements that seemed to elude the merits. Commissioner James Quello characterized the FCC's proposal as a "sincere effort,"[177] while Commissioner Patricia Diaz Dennis said she agreed that the FCC's "former must-carry rules . . . contributed to the problems we are faced with today."[178]

Senator John Danforth, Chairman of the Senate Commerce Committee that oversees the FCC, reacted to the FCC's plan with

---

173 *Id.* at 40.

174 *Id. The FCC and Must Carry: Converging On Consensus*, 111 BROADCASTING 39 (Aug. 4, 1986).

175 *Id.*

176 *See* 1 F.C.C. RCD. 864 (1986). In this action, the Commission adopted new rules requiring carriage of minimum numbers of local stations by each cable system, with a sunset provision specifying that the regulation would be effective for five years. The Commission also required the institution of a consumer education and equipment distribution program to ensure that every cable subscriber could get access to broadcast signals through conventional means. The central feature of this agenda was the A/B switch.

177 *A Five-Year Reprieve for Must Carry*, 111 BROADCASTING 35, 37 (Aug. 11, 1986).

178 *Id.*

harsh criticism: "[t]he must-carry issue presented the FCC with an opportunity to show Congress its expertise in balancing competing values and acting in the public interest. The commission went to the plate with a chance to hit a grand slam. It came away with a base hit."[179]

The industry parties, who had worked hard at creating the consensus agreement submitted to the FCC, showed little real enthusiasm for the FCC's initial attempt to revise the must-carry rules. National Association of Broadcasters ("NAB") President Eddie Fritts declared that the decision was "a victory for American TV viewers," but one that he was sure would "be headed for the courts."[180] NCTA President James Mooney sounded more like a casual bystander than an active participant when he declared: "the must-carry rule announced by the [C]ommission today is somewhat more stringent than cable bargained for, yet in a long-term sense somewhat less than the broadcasters bargained for."[181] Even public broadcasters, who benefitted from the FCC's action, were disappointed. The National Association of Public Television Stations and the Public Broadcasting Service charged that by failing to mandate cable carriage for more than one local public television outlet, the FCC had "failed to adequately protect the public's right to diverse public television services."[182]

Within four months, the Commission's must-carry order began to unravel. The NAB and NCTA continued to work together, but now in opposition to the A/B switch portion of the new must-carry rules. As 1986 came to an end, the FCC received a joint NAB-NCTA filing, supported by the Community Antenna Television Association and the Television Operator's Caucus,[183] asking the agency to stay the new must-carry scheme pending reconsideration. With unusual speed, the Commission voted to in-

---

179 *Must-Carry Denouement: Enough Bad News To Go Around*, 111 BROADCASTING 37 (Aug. 11, 1986).

180 *Id.*

181 *Id.* at 38. Mooney added, though, that the FCC "forcefully and clearly rejected the notion that cable is some sort of monopoly or merely ancillary to broadcasting and that pleases us." *Id.*

182 *Id.*

183 The Community Antenna Television Association represents a constituency largely comprised of small cable television systems, many of which are independently owned or lack ownership ties with the large multiple system operators that dominate the cable industry. Members of the Television Operator's Caucus include Tribune Broadcasting, The Washington Post Company, and other companies that own television stations in large urban markets. The Caucus represents the companies' interests when issues affecting them arise in Congress or at the FCC.

definitely put the matter on hold.[184]

Broadcasters then began to solicit congressional support for a permanent must-carry rule. The FCC began to feel the heat of political forces from all sides. By March, the Commission had allowed a sufficient amount of time to pass, thus setting the stage for issuing a revised set of must-carry rules.[185] The strong "public interest" justification for mandatory A/B switches was diluted substantially. Cable systems were now required to merely offer to supply and install an A/B switch for subscribers; existing subscribers would pay for the switch and its installation, while new subscribers could either install the switch themselves, or pay the cable company the labor costs for installation.[186] The revised new rules also contained language which made it clear that subscribers could decline the switch offer and would not be otherwise obligated to install or maintain off-the-air capability.[187]

C. *Common Carriers*

1. Access to Local Telephone Exchange Facilities by Common Carrier Services

In late 1973, "the Bell System companies filed tariffs with [the FCC] offering two types of access facilities to Domestic Satellite carriers: *entrance* facilities . . . and *intercity* interexchange channel facilities. . . ."[188] Fourteen additional Bell System companies filed separate tariffs to provide local distribution facilities to both domestic satellite carriers and other carriers.[189]

Soon thereafter, a group of carriers, including Microwave Communications, Inc., MCI Telecommunications Corp. ("MCI"), Western Union Telegraph Co., and Southern Pacific Communications Co., filed petitions to suspend and investigate these tariffs.[190] Although the FCC denied these petitions and allowed the tariffs to become effective, it agreed to institute Docket No. 19896, which would investigate claims that AT&T and the Associated Bell System companies were not interconnecting their facilities with those of non-Bell, non-telephone company com-

---

184 Stay Order, 2 F.C.C. Rcd. 603 (1986).

185 Amendment of Part 76 of the Commission's Rule Governing Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C. Rcd. 864, 867 (1986).

186 *Id.* at 886.

187 *Id.*

188 In Re AT&T, Offer of Facilities For Use by Other Common Carriers, Memorandum Opinion and Order, 52 F.C.C.2d 727, para. 3 (1975).

189 *Id.*

190 *Id.* The petitions of the carriers asked the FCC to suspend the effectiveness of the Bell System companies' tariffs and to set them for hearing on the question of lawfulness.

mon carriers.[191]

The FCC released its decision in April, 1974, concluding that Bell was required to establish, without unreasonable delay, physical connections with MCI and other specialized common carriers.[192] In July, 1974, the Commission instituted Docket No. 20099, a broader inquiry aimed at investigating all Bell System companies' tariffs offering facilities for use by other common carriers.[193]

Nineteen Bell System companies then filed revised tariffs in a uniform format, each containing similar terms and conditions. In response, the Commission placed these tariffs under investigation and issued a *Hearing Order* designating the issues to be covered. Twenty-four factual issues were identified and broadly grouped to encompass tariff construction and application, rates and charges, and restrictions on use of facilities.[194] Three legal issues concerning the FCC's appropriate role in evaluating the reasonableness of the tariffs were also included.[195]

"[T]he Commission adopted expedited procedures [for the investigation], consisting of three rounds of submissions — comments, responses and replies — rather than an oral trial-type hearing."[196] Before these procedures began, however, AT&T expressed its willingness to participate in less formal talks with all interested parties, including the FCC, in order to reach a settlement. The Chief of the Common Carrier Bureau agreed by postponing the hearing dates, which allowed the parties to enter into and continue informal settlement discussions.[197] Assuming the role of facilitator, the FCC agreed to take part in the negotiations.

Negotiations began in October, 1974, and continued almost daily for more than five months. The participants ultimately pro-

---

191 *Id.* at 729.

192 Bell Sys. Tariff Offerings of Local Distrib. Facilities, 46 F.C.C.2d 413, 438-39 (1974), *aff'd sub nom.*, Bell Tel. Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). *See also* Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules, 29 F.C.C.2d 870 (1971), wherein the Commission emphasized the importance of prior coordination among carriers to settle technical matters, and that established carriers with exchange facilities should facilitate the negotiation of interconnection or leased channel agreements with new carriers.

193 AT&T, Offer of Facilities Use By Other Common Carriers, 47 F.C.C.2d 660 (1974).

194 *Id.*, para. 13.

195 AT&T, Offer of Facilities For Use By Other Common Carriers, 52 F.C.C.2d 727, para. 9 (1975).

196 *Id.*, para. 10.

197 *Id.*

duced a Settlement Agreement, which was submitted to the Commission along with a joint motion to conclude the proceeding. The Agreement offered, among other things, interconnection facilities without many of the restrictions formerly imposed.[198] It also established, for the first time, "generally applicable operating and technical relationships between Bell and other common carriers."[199]

The FCC accepted the Settlement Agreement, noting that its terms were "in the public interest because they expedite and further the implementation of established Commission policy."[200] The Commission also noted that "the settlement affords an expeditious and acceptable compromise of differences on matters which would otherwise necessitate substantial time, expense and effort to resolve through formal Commission processes."[201]

All parties to the Settlement Agreement were expected to comply with its spirit as well as its terms. The FCC stipulated that future meetings were necessary, and were to be conducted "under the aegis of the Commission's Common Carrier Bureau to review the progress in implementing the Settlement Agreement."[202] In doing so, the Commission sent a clear message to all parties that this area would remain under scrutiny. No judicial appeal of this FCC order was sought because the interests of affected parties and the FCC's goal of producing a good public policy outcome coincided.

The FCC indicated that, despite its desire to have differences resolved informally in face-to-face meetings, "no one would be precluded from bringing to the Commission's attention any matter" that required FCC action.[203] In other words, if informal meetings proved to be unsatisfactory, the remedy of having the Commission institute a formal proceeding remained available.

---

198 *See generally id.*, app. A (for a description of the new interconnection facilities).

199 *Id. See also id.*, app. A (for a description of operation and technical relationship).

200 *Id.*, para. 13.

201 *Id.*

202 *Id.*, para. 14. The FCC indicated that they "expect to closely monitor the implementation of the Settlement Agreement." *Id.*

203 *Id.* Indeed, in 1978 the FCC instituted what came to be its multi-phased inquiry into the Message Telecommunications Service ("MTS") and Wide Area Telephone Service ("WATS") market structure. The FCC analyzed the merits of a competitive marketplace, potential regulatory frameworks, and the rate structure to be implemented, all under the mandate of serving the public interest. *See* MTS and WATS Market Structure, 73 F.C.C.2d 222 (1979); MTS and WATS Market Structure, 81 F.C.C.2d 177 (1980); MTS and WATS Market Structure, 93 F.C.C.2d 241 (1983).

2. Interexchange/Local Exchange Disputes

In August, 1984, Lexitel, a specialized carrier, filed a petition with the FCC asking the agency to formally "establish and chair a forum for resolving certain problems it claim[ed] to have encountered with various local exchanges."[204] Lexitel, was joined by two other specialized carriers, Allnet Communications Services, Inc. and Teltec Savings Communications Co., in proposing that the Commission convene and chair a series of monthly meetings to hear and resolve complaints in an industry-wide forum.

The Exchange Carrier Standards Association ("ECSA") (a trade association of exchange carriers formed to address technical and related matters affecting the interconnection of services and equipment with exchange facilities) felt that a resolution to the problems would best be achieved through one-on-one negotiations. ECSA argued that "matters of a more general concern, *i.e.*, those involving local exchange/interexchange relationships that occur on a nationwide basis, should be resolved in either of two forums conducted under the sponsorship of ECSA."[205] In any event, ECSA urged that issues should not be brought for resolution by a forum unless they were preceded by one-on-one negotiations.

The FCC favored ECSA's approach over that of Lexitel for several reasons. First, given the broad spectrum of potential complaints, the FCC believed the "prompt resolution of complaints would be seriously impeded if the screening process of prior negotiations were bypassed."[206] Such negotiations could lead to, at least, a partial, if not a complete, resolution of a dispute, thereby limiting the range of issues to be addressed through the forum process.

The Commission also approved utilization of two existing industry forums, the Network Operations Forum ("NOF") and the Interexchange Customer Service Center ("ICSC").[207] These forums would be coordinated by a new Carrier Liaison Committee ("CLC") composed of representatives from the interexchange carriers, the local exchange carriers, and the FCC.[208]

The CLC would screen a complaint to determine whether it

---

204 Equal Access Complaint Resolution, 58 RAD. REG. 2d (P&F) 731 (1985).
205 *Id.* at 733.
206 *Id.* at 738.
207 *Id.* The NOF is a forum for resolving provisioning problems, i.e. installation, repair and maintenance. The ICSC is a forum for resolving exchange access ordering problems. *Id.* at 734.
208 *Id.* at 733, 739.

fell within the established forum categories: ordering, installation, repair, and maintenance issues of nationwide import.[209] Moreover, the CLC would be responsible for directing the complaint to the appropriate forum for resolution. The NOF would handle provisioning problems such as installation, repair, and maintenance, while the ICSC would be charged with resolving exchange access ordering problems.[210] Despite these subject matter limitations, the Commission indicated that these classifications should remain open so that they could be reexamined and redefined as experience warranted.[211]

The FCC decided to participate in the CLC only as an observer in order to ensure that the agenda-setting process provided the specialized carriers with a full opportunity to raise their legitimate complaints. FCC staff members have not participated in the actual complaint resolution process. The Chief of the Common Carrier Bureau continues to receive detailed minutes of the CLC, NOF, and ICSC on a monthly basis in order to monitor these forums.[212] In practice, further Commission intervention has not proven to be necessary.

3. The Frequency Coordination Process

Frequencies allocated to the private land mobile radio services are assigned to individual applicants through a process known as frequency coordination.[213] A private organization recommends to the FCC the most appropriate frequencies[214] for particular applicants. "Each year the Commission receives about 350,000 applications for licenses to operate radio stations in the private land mobile radio services."[215]

Before 1958, the Commission's rules in this field contained few specific procedures for coordinating frequencies, but they did indicate that frequencies could only be obtained on a shared basis.[216] Frequency coordinating committees, which generally represented the entities using the service, were formed to facilitate cooperation in selecting and using these frequencies with

---

209 *Id.* at 734.
210 *Id.*
211 *Id.* at 739.
212 *Id.*
213 *See* In re Frequency Coordination in the Private Land Mobile Radio Services, 103 F.C.C.2d 1093, para. 1 (1986) [hereinafter Frequency Coordination].
214 *Id.*, para. 2. "Appropriate" frequencies are determined by the applicants specific needs and various environmental conditions facing the station.
215 *Id.*
216 *Id.*, para. 3.

minimum interference. Consequently, the FCC amended its rules to specifically recognize these coordinating committees and to indicate that their recommendations would be given consideration in the FCC's frequency assignment decisions.[217]

Since 1958, private land mobile radio applicants have had two options in selecting frequencies. If they choose to select their own frequency, applicants must submit a report based upon a field study that shows probable interference with all stations operating on the frequency within a set distance. They must also submit a statement that the licensees of these co-channel stations have been notified of the proposed operation. Alternatively, recognized frequency coordinators can select the frequency based upon their experience and familiarity with local operating parameters.

In practice, the first option created a number of problems. The quality of field studies submitted to the FCC varied widely due to a lack of concrete standards. Additionally, the FCC often had to send numerous letters requesting further information from applicants. This created delays in application processing, which resulted in a greater workload at the Commission. Finally, since many applicants chose the coordination route, there could be little certainty that the frequency they applied for had not already been awarded by an outside coordinating committee.

In 1982, Congress amended the Communications Act to clarify its approval of the FCC's utilization of frequency coordinators in the spectrum management process.[218] The Conference Report[219] accompanying the legislation noted:

> [F]requency coordinating committees not only provide for more efficient use of the land mobile spectrum, but also enable all users, large and small, to obtain the coordination necessary to place their station on the air. Without such frequency coordinating activity, some of these applicants would not be able to afford the engineering required in the

---

217 Change in Availability of Frequencies, Report and Order in Docket No. 11991, FCC 58-602, 23 Fed. Reg. 4784, paras. 59-60 (1958).

218 The Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 (1982). Section 331(b)(1) of the Act provides that:

> The Commission, in coordinating the assignment of frequencies to stations in the private land mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

Frequency Coordination, 103 F.C.C.2d 1093, para. 11.

219 H.R. CONF. REP. No. 765, 97th Cong., 2d Sess. 2261, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2237, 2261.

application process.[220]

Conferees also encouraged the Commission to develop rules or procedures for monitoring the performance of the coordinating committees.

In response, the FCC initiated a *Notice of Inquiry* to examine the coordination procedures governing private land mobile radio frequencies.[221] It then issued a *Notice of Proposed Rule Making* to improve select aspects of the coordination process.[222] The new rules[223] enhance the role of frequency coordinators and give greater Commission deference to their decisions. These rules require all applicants proposing new stations or modifying existing licenses to send their completed applications to the recognized coordinator in the radio service or pool of frequencies in which they are applying. The coordinator is responsible for checking the application for accuracy, completeness, and compliance with Commission rules. The coordinator then identifies the most suitable frequency, subject to Commission resolution if the coordinator is unconvinced that the applicant's proposed operation is acceptable.

In addition, this was the first time that the FCC required coordinators to participate in post-licensing conflicts. The FCC based its decision on the expertise of the coordinators which included: 1) the specific knowledge of user requirements and local conditions; 2) the knowledge of conflicts and consequent ability to act upon pending or future coordinating requests; and 3) the ability to provide objective and informed assistance to the licensees.[224] The Commis-

---

220 *Id.* at 2252. This pro-competitive aspect of frequency coordination is of particular significance to small business operators. With the frequency selection process essentially equalized for all applicants, no one applicant may operate on a more advantageous frequency than its competition. *Id.*

221 Proposed Rules, 48 Fed. Reg. 35149 (1983). The Notice of Inquiry elicited more information on the following subjects:

a. What would the functions of frequency coordinating committees be?
b. What authority should frequency committees have?
c. Should there be one exclusive or multiple frequency coordinating committee for each radio or service?
d. What oversight of frequency coordinating committees should there be by the commission?
e. Is the field study option of frequency coordination effective and should it be retained?

Id.

222 Proposed Rules, 49 Fed. Reg. 45454 (1984). To alleviate the problems inherent in the existing frequency coordination, the FCC:

> proposed new rules and policies designed to: (1) improve quality of frequency selection; (2) minimize processing delays; (3) encourage interservice frequency sharing; and (4) facilitate the introduction of new technologies.

Frequency Coordination, 103 F.C.C.2d 1093, paras. 13-14.

223 *Id.*, app. C (1986).

224 *Id.*, para. 26. The Central Committee supports the Commission's proposal to

sion's *Report and Order* emphasized that: "[w]e will become involved [in post-licensing conflicts] only if the coordinator and the affected parties cannot agree upon a solution."[225]

The Commission also re-emphasized its authority to oversee the coordinators.

> While we expect the coordinators to serve the public in a responsible manner, we feel impelled to maintain oversight of the coordinators' actual performance. . . . Where it appears that a coordinator is not performing [his or her] duties in a manner consistent with the public interest obligations imposed in this proceeding, the Commission may, on its own motion or at the public's request, conduct an inquiry into the coordinator's performance. . . . In the event that this investigation results in the decertification of a coordinator, we will then commence action to certify a new coordinator for the particular service involved.[226]

4. Exchange Network Facilities For Interstate Access ("ENFIA")

Based upon decisions by the FCC in the early 1970s, MCI and other specialized common carriers were permitted to obtain relatively inexpensive connections to local telephone exchange facilities.[227] These connections were used to offer point-to-point private line service and "open-ended" services that utilized local exchange facilities at only one end of the conversation. They were also used to provide a service called Execunet, which provided customers with shared use of a large number of inter-city lines that could be directed by computerized equipment to send calls to desired destinations.[228]

The FCC, intervened at the urging of AT&T. The Commission rejected MCI's Execunet tariff in 1976, finding the service to

---

require the participation of coordinating committees in post-licensing conflict resolution. The Central Committee's PFCC (Petroleum Frequency Coordinating Committee) has traditionally aided licensees in the attempted elimination of interference between stations. Because coordinating committees will presumably retain the most accurate information available concerning the use of adjacent and co-channel assignments for each licensee, they will be uniquely equipped to aid licensees in resolving interference between stations. *Id.*

225 *Id.*

226 *Id.*, para. 127.

227 MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 522 (1983). *See, e.g.*, Bell Sys. Tariff Offerings, 46 F.C.C.2d 413, *aff'd sub nom.*, Bell Tel. Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); Specialized Common Carrier Servs., 29 F.C.C.2d 870 (1971), *aff'd sub nom.*, Washington Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975).

228 *MCI Telecommunications Corp.*, 712 F.2d at 522.

be the functional equivalent of AT&T's interstate long distance Message Telecommunications Service ("MTS") and Wide Area Telecommunications Service ("WATS").[229] The FCC held that the Execunet offering exceeded the scope of the original MCI authorizations and thus could not be offered.

The Commission's decision was subsequently reversed and remanded by the District of Columbia Circuit Court of Appeals, which held that the FCC had not made the explicit public interest findings necessary to bar a carrier from using its facilities to provide any type of service.[230] The FCC held firm, however, and ruled that its interconnection orders did not require local telephone operating companies to provide additional local exchange connections to MCI and other specialized carriers for the provision of MTS/WATS-type services.[231]

This decision was also appealed, and the D.C. Circuit again reversed the FCC,[232] indicating that the Commission's failure to provide connections for MTS/WATS-type services violated the court's mandate in the first Execunet decision. As a result, a legal obligation was imposed on local telephone companies to interconnect their exchange facilities with those of the specialized common carriers. The carriers, in turn, were to be permitted to provide any service approved by the FCC through the issuance of a certificate of convenience and necessity.[233]

The court did not address the issue of possible compensation for local telephone companies.[234] As a result, the Bell operating "companies filed a new tariff with the FCC seeking to offer . . . Exchange Network Facilities for Interstate Access"[235] ("ENFIA"). The rates they proposed however, were much higher than the local business line rates paid by the specialized carriers while

---

229 MCI Telecommunications Corp., v. FCC, 60 F.C.C.2d 25 (1976), *rev'd*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

230 *Id.*

231 *AT&T*, 67 F.C.C.2d 1455 (1978). The Petition for a Declaratory Ruling and Expedited Relief filed by AT&T will not provide any additional corrections to local exchange services to "Other Common Carriers" for their use in the provision of service offerings which are not private line services. *Id.*, para. 1. The Court found no obligation imposed "upon local operating companies which interconnect with an interstate carrier to provide a through service . . . if the second carrier fails to offer compensation to the local operating companies which is comparable to the compensation the local operating companies receive from the first carrier." *Id.*, para. 82.

232 MCI Telecommunications Corp. v. FCC, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978).

233 Exchange Network Facilities for Interstate Access, 71 F.C.C.2d 440, para. 3 (1979).

234 *Id.*, para. 4. The proposed tariff became the target of litigation; plaintiffs alleged that it was detrimental to competition in the marketplace and unlawful.

235 *Id.*

the Execunet litigation was pending.[236] This tariff was modeled after the cost compensation scheme for MTS/WATS specified by the Separations Manual incorporated into the FCC's rules and regulations.[237] The specialized carriers vigorously opposed establishing interconnection rates based upon this pricing scheme.

The FCC, caught in the crossfire, concluded that the most effective way to treat the fundamental legal, economic, and policy concerns, would be to initiate a comprehensive inquiry on the MTS/WATS market structure.[238] A *Notice of Inquiry and Proposed Rule Making* proceeding was commenced in order to consider what reimbursement the local plants were entitled to and "whether and how these charges can be equitably imposed on all interstate services."[239] The review of the tariff-filing and the extensive rulemaking suggested that either proceeding—and probably both—would generate time-consuming and duplicative litigation.

In order to prevent such gridlock in this important policy area, the Assistant Secretary of Commerce for Communications and Information, Henry Geller, urged the FCC to "undertake negotiations to arrive at some form of a 'rough justice' interim approach to the compensation local telephone companies would receive for use of their exchange facilities"[240] by specialized common carriers offering MTS/WATS-like services. The Assistant Secretary's proposal reflected the sentiment of many government policy-makers concerned with this issue, as well as that of the industry players who would be directly affected by imposition of an access-charge system. The policy-makers sought a sense of equity, and the specialized carriers were anxious to obtain a degree of certainty about access terms and charges as soon as possible.

Thus, AT&T had little, if any, leverage in resisting the negotiation of charges that differed with those contained in its initial ENFIA tariff. As former Common Carrier Bureau Chief Bernard

---

236 MTS and WATS Market Structure, 67 F.C.C.2d 757 (1978).

237 *See* Exchange Network Facilities for Interstate Access, 71 F.C.C.2d 440, *modified*, 73 F.C.C.2d 222 (1979).

238 *Id. See also* MTS and WATS Market Structure, Supplemental Notice of Inquiry and Rule Making, 73 F.C.C.2d 222 (1979); MTS and WATS Market Structure Report and Third Supplemental Notice of Inquiry and Proposed Rule Making, 81 F.C.C.2d 177 (1980); MTS and WATS Market Structure, Third Report and Order (Phase I), 93 F.C.C.2d 241 (1983); MTS and WATS Market Structure, Notice of Proposed Rule Making (Phase III), 94 F.C.C.2d 292 (1983).

239 MTS and WATS Market Structure, Notice of Inquiry and Proposed Rule Making, 67 F.C.C.2d 757, para. 8 (1978), MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 524 n.7 (D.C. Cir. 1983).

240 AT&T, Memorandum Opinion and Order, 91 F.C.C.2d 1079, para. 4 (1982).

Strassburg observed, "AT&T could have stonewalled and forced a prolonged hearing. It chose the conciliatory course because it could not afford the risk of pricing its competitors out of the market."[241] In other words, AT&T's best alternative was participating in negotiations, in order to avoid antagonizing the FCC, NTIA, and the courts.

The ENFIA negotiation process took place in late 1978.[242] A series of public meetings concerning various telephone industry interests were held under the aegis of the FCC.[243] The Commission was represented by David Irwin, a lawyer who reported directly to Common Carrier Bureau Chief Larry Darby. Irwin's role was that of a facilitator. He moderated each meeting and kept the parties on track in reaching an agreement among themselves. Although he remained neutral, participants later described his presence as "indispensable" because he was able to offer guidance about what solutions might be unacceptable if presented to the FCC.[244] Everyone understood that the FCC would impose a solution through prescriptive regulation if one could not be reached through a negotiated agreement. The visible hand of regulation, embodied by Irwin, thus loomed as a constant reminder that an external answer would be provided in the event that an internal one was not generated.

Those participating in the negotiations limited the scope of their discussion to ENFIA charges, rather than expanding them to related access-charge areas such as foreign exchange services. Focusing on the issues in dispute helped to expedite the process.[245]

Independent of its outcome, the ENFIA process itself was helpful to communications policy-making activities at the FCC. It generated a wealth of factual information that may have taken months to gather had the Commission relied solely on its rulemaking process. Such information, even if no agreement was reached, would have been useful as a basis for decisionmaking.

Many participants credited former Common Carrier Bureau Chief Bernard Strassburg's role in eliciting and responding to information during the negotiations.[246] Strassburg, an attorney in

---

241 *See* Borchardt, The ENFIA Interim Settlement Agreement (Harvard University, Center for Information Policy Research, 1981) (statement of Bernard Strassburg at 7) [hereinafter Borchardt].

242 *MCI Telecommunications Corp.*, 712 F.2d at 524.

243 *Id.*

244 Borchardt, *supra* note 241, at 9.

245 *Id.* at 10.

246 *Id.*

private practice, became an observer on his own initiative, and thus could offer both neutrality and expertise. Parties viewed him as a unique resource regarding facts, law and policies. The role of Strassburg as independent catalyst deserves emphasis. His experience at the Commission had instilled in him a sense that negotiations could be successfully employed in the common carrier area, and more specifically, in determining television program tariffs or the interconnection of customer premises equipment. These types of negotiations, like ENFIA, were readily manageable because the number of players with identifiable stakes was limited.

The public nature of the ENFIA process included an FCC notice inviting participation of all interested parties. Moreover, the process itself was flexible enough to allow participants a more active role once negotiations began. For example, representatives of independent telephone companies, such as GTE Service Corporation, and trade associations, such as the Organization for the Protection and Advancement of Small Telephone Companies, found that their interests were not being discussed at the outset.[247] By bringing their concerns forward, they became equal negotiating partners with AT&T and specialized carriers such as MCI and Southern Pacific Communications Corporation.

The National Association of Regulatory Utility Commissioners ("NARUC") began as a casual observer, since the issues under discussion had no immediate impact upon state regulation of telephone common carriers. When it became apparent that potential changes could be made in the separations and settlements process without convening the Federal-State Joint Board, as required by section 410(c) of the Communications Act,[248] NARUC requested and was granted participant status in the negotiations. It filed comments throughout the proceeding and successfully cautioned other parties about the legal implications of extending the negotiations to cover other access charge issues.[249]

In December, 1978, two months after the process began, an Interim Settlement Agreement was executed by the telephone company parties and service providers.[250] The Agreement, submitted for Commission approval and released in the Federal Register for public comment, explicitly recognized an inherent

247 *Id.* at 18.
248 47 U.S.C. § 410(c) (1982).
249 Borchardt, *supra* note 241, at 19.
250 MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 524 (D.C. Cir. 1983).

discrimination between the treatment of MTS/WATS-type services and other interstate services, which allowed users to pay only local business rates for connections to local exchange facilities.[251]

The parties, however, were persuaded that their task was not to resolve such discrimination "if doing so would foreclose immediate interim resolution of the other issues."[252] As a result, the Agreement specified compensation if the charges established "could, after appropriate consideration by the Commission, be ultimately applied to other services which also utilize the local telephone company exchange facilities."[253]

Perhaps the most important element was the Agreement's interim nature. The settlement was to expire on the effective date of a Commission Order disposing of the related issues in the MTS/WATS Market Structure proceeding, or five years from the effective date of the Agreement, whichever occured first.[254]

The five-year expiration term was divided into two phases. The first phase was to cover three years. The second phase would cover the final two years, but only if the FCC determined that it was reasonable to continue the Agreement and that an appropriate level of payment for the use of jointly-used subscriber plants could be established.[255]

In time, these conditions were met, and both phases were implemented.[256] The Commission's extension decision rested upon the simple finding that "it is reasonable and in the public interest to continue the agreement."[257] On appeal, the D.C. Circuit upheld the extension, indicating that "the ENFIA Agreement continued to represent a useful interim mechanism."[258]

The Agreement reflected the signatories' belief that the joint tariff was an acceptable compromise that would "serve the public interest." In accepting the Agreement's terms, the FCC recognized that its inquiry prior to approval could not be "limited to

---

251 *Id.*

252 Letter from Henry Geller, Assistant Secretary of Commerce for Communications and Information, to Lawrence Darby, Chief, FCC Common Carrier Bureau (Oct. 17, 1978) *cited in MCI Communications Corp.*, 712 F.2d at 517 n.7.

253 ENFIA Agreement, para. 5, *reprinted in* Proposed Rule, 43 Fed. Reg. 59,129-132 (1978).

254 *See MCI Telecommunications Corp.*, 712 F.2d at 529-531.

255 *Id.* at 532.

256 Extension of ENFIA Agreement, 90 F.C.C.2d 6 (1982). This extended the access compensation order, adopted April 12, 1979, until the earlier of three possibilities: 1) the effective date of access charge tariffs filed under a Commission order; 2) the effective date of access charge tariffs filed according to requirements of future amendments to the Communications Act of 1934; or 3) April 16, 1984.

257 Exchange Network Facilities ("ENFIA"), 71 F.C.C.2d 440, para. 18 (1979).

258 *MCI Telecommunications Corp.*, 712 F.2d at 533.

these parties' individual interests."[259] The Commission said it was obligated to assess how the public interest might be effected by the Agreement. The FCC concluded, that the public interest could not be calculated "with mathematical precision" on the basis of existing data, but would be served by avoiding "protracted litigation" and creating "some degree of certainty" in this uncharted field.[260] As a result, it approved the settlement and characterized it as "an expeditious and acceptable compromise of differences on matters relating to methodologies, rate levels and rate components which would otherwise necessitate substantial time, expense and effort to resolve through formal Commission processes [and likely appellate review]."[261]

As a public policy matter, perhaps the most sensitive issue of the ENFIA process was how the Commission would apply the rates specified in the Agreement to carriers who were not part of the Agreement. The signatories expressly waived their rights to relief from a finding that the Agreement's rates were discriminatory, but those who were not signatories could not be constructively bound to abide by that waiver.

The D.C. Circuit granted non-signatories a right to claim retroactive access charge refunds based upon the discriminatory rate scheme of ENFIA.[262] Standing alone, this action could be viewed as a fatal weakness in any tariff negotiation, because a party could preserve a right to challenge the terms of an agreement by simply not signing it. The court, however, was careful to narrow its holding by emphasizing that it was "a limited one confined to the unique circumstances of this case. . . . We express no view on the question whether provisions for retroactive adjustments are inherent in the very concept of interim rates, and we caution that our opinion should not be read as embracing any such general proposition."[263]

This suggests that if future interim tariffs were approved by the FCC after a negotiation process among private parties, the

---

259 *ENFIA*, 71 F.C.C.2d 440, para. 2 (1979). This presents the highlights of the proposal before the Commission, which is intended to provide a basis for compensating local telephone companies for use of their facilities by interstate specialized common carriers, and weighs the public interest in such a plan against signing parties' interests and collective justice.

260 *Id.*, para. 31.

261 *Id.*, para. 42. It should be noted that, in 1984, the FCC terminated the ENFIA Agreement as its interim solution, and instituted a new rate schedule. Access Tariff Order, Memorandum Opinion and Order, Slip Opinion, CC Docket No. 83-1145, FCC 84-201 (released May 15, 1984).

262 *MCI Telecommunications Corp.*, 712 F.2d at 537.

263 *Id.*

due process arguments raised by those who chose not to be part of an underlying agreement would not be accepted at face value. Given the court's reasoning, if parties opt out based upon "conscious strategic decisions," judges may find their claims for retroactive relief to be "particularly troublesome."[264]

On balance, and with the benefit of nearly a decade of hindsight, the ENFIA Agreement can be fairly characterized as a success. As noted by attorney Robert Ross, who represented Southern Pacific Communications during the process, "this approach provided an opportunity to challenge the numbers and assumptions upon which it was based more directly and expeditiously than is possible in a formal rate hearing."[265] The success of these two proceedings suggests that further systematic experimentation with negotiation as an auxiliary process to adversary proceedings could produce equally effective policy outcomes. "Rough justice," to be sure, may be rough, but in the end, the concept of justice is what lingers in the minds of policy-makers and interested parties.

5. Uniform Settlement Policy

The total amount of money that corresponding international communications administrations and/or carriers divide among themselves for a specified measure of international communications service is known as a settlement rate. These rates are routinely set by the International Record Carriers ("IRCs") and the International Postal, Telephone and Telegraph ("PTT") authorities. A problem with these negotiations arises when several carriers seek to provide parallel routes within the same country. Foreign correspondents can use their monopoly status to play one carrier against another. In so doing, they can gain significant concessions from the IRCs, which would then recoup their losses by charging higher prices to American ratepayers.

The Commission first articulated the concept of "whipsawing" in 1936,[266] and in 1977 reaffirmed its policy of requiring uniform settlement rates on parallel international communica-

---

264 *Id.* at n.32.

265 Borchardt, *supra* note 241, at 20.

266 Mackay Radio and Telegraph Co. v. FCC, 2 F.C.C. 592 (Telegraph Committee 1936), *aff'd by the Commission en banc*, 4 F.C.C. 150 (1937), *aff'd sub nom.* Mackay v. FCC, 97 F.2d 641 (D.C. Cir. 1938). The Commission denied Mackay a radio circuit to Oslo, Norway. The FCC found Mackay's agreement with the Norway PTT objectionable because it would have allowed the PTT to play two U.S. entities against each other, to manipulate traffic flows, and to get a greater percentage of the accounting rate at the expense of a U.S. carrier.

tion routes.[267] In effect, the uniform settlement rate is a device to ensure that once an IRC has negotiated with a particular IRC, then all that follow will be bound by the terms of that negotiation.

The rationale for this policy is clear and convincing. If IRCs were allowed to manipulate their settlement rates in order to secure a larger share of data traffic in a country, the likely result would be rates too low to fully compensate the IRCs for the costs incurred in handling the traffic. In the Commission's words, "higher tariffs for U.S. ratepayers, attempted cross-subsidizations by the U.S. carriers, or a gradual financial weakening of the U.S. carriers, would clearly be consequences of substantial concern."[268]

6. Alaska Earth Stations

Applications to provide Message Telecommunications Service ("MTS"), television reception and, in some cases, private line services to thirty-five remote Alaskan Bush communities were filed between 1975 and 1980 with the FCC by Alascom, a private company offering these common carrier services.[269] The state of Alaska filed a competing application because it was dissatisfied with Alascom's proposal to construct small earth stations around the state for both economic and technical reasons. The state intended to lease the facilitites to a carrier offering the most favorable terms.[270]

The Commission found these applications to be "mutually exclusive because one facility could provide all the services proposed by either party and [there were no] public interest benefits in authorizing the construction of duplicative facilities. . . ."[271] Alascom was granted a temporary authorization to operate, conditioned on the resolution of the ownership issue. The state of Alaska withdrew its application when local exchange operators filed applications to construct new stations or to acquire those operated by Alascom.[272] Alascom then negotiated agreements

---

267 Uniform Settlement Rates, 66 F.C.C.2d 359 (1977), *policy affirmed*, 84 F.C.C.2d 121 (1980).

268 Uniform Settlement Rates, 66 F.C.C.2d 359, para. 19 (1977). This decision dealt with two basic issues: whether or not it is in the public's interest for the Commission to adhere to a uniform settlement policy; and, if the commission chooses such a policy, whether it has jurisdictional authority to impose that policy on U.S. communications common carriers.

269 Message Telecommunications Service, 96 F.C.C.2d 522 (1984).

270 Earth Stations, 92 F.C.C.2d 736, para. 7 (1983).

271 *Message Telecommunications Service*, 96 F.C.C.2d 523, para. 2.

272 *Earth Stations*, 92 F.C.C.2d 736, para. 4.

with some of the local carriers; this led to the withdrawal of the competing applications of the local carriers.[273]

The Commission was thus faced with the problem of what to do in the remaining situations where mutually exclusive applications were still pending. The state attempted to mediate a settlement, but apparently was not successful. The FCC continued to encourage mutual accommodations through a negotiated settlement between the competing applicants, calling it the "preferred resolution" to the proceeding.[274]

A stalemate developed, and the parties requested Commission guidance on certain matters that they claimed had inhibited an operating agreement. In a tentative decision, the FCC mandated a joint ownership arrangement, with Alascom holding a 51% interest and the local carrier a 49% interest.[275] In its final decision, the FCC again relied upon the joint ownership solution, but instead required a 50-50 equity split.[276]

The FCC then proceeded to detail a process for breaking the impasse. "There is no apparent reason," the FCC noted, "why Alascom, and the exchange carriers, acting responsibly, cannot successfully conclude a joint operating agreement."[277] In order to facilitate such an agreement, the Commission added a condition to the joint licensing arrangement that required the parties to "specify some means for arbitration to resolve controversies that may arise before or after operating contracts are negotiated. . . ."[278] Absent an agreement on appointment of an arbitrator, the Commission specified that the Alaska Public Utilities Commission would serve in that capacity.[279]

The Commission reasoned that disagreements about ownership and operating details were normally dealt with by the carriers, rather than the Commission.[280] The Commission retained authority to settle disagreements that arose exclusively within its jurisdiction, but indicated that it would look to local authorities for guidance. "We do not expect any such disputes to arise," the Commission added, "as the parties, as joint licensees, turn their energies from litigation to the provision of efficient communica-

---

273 *Message Telecommunications Service*, 96 F.C.C.2d 524, para. 2.
274 *Id.*
275 *Earth Stations*, 92 F.C.C.2d 736, para. 52.
276 *Message Telecommunications Service*, 96 F.C.C.2d 522, para. 20.
277 *Id.*, para. 21.
278 *Id.*, para. 22.
279 *Id.*
280 *Id.*

tion service to the Bush at reasonable charges."[281]

V. Negotiated Rulemaking as a Policy Tool

According to Erwin Krasnow and Lawrence Longley, authors of *The Politics of Broadcast Regulation*, "[t]he FCC is more than just an independent regulatory commission wrestling with the problem of its political nonindependence; it is also a bureaucracy. As such it exhibits all the classic symptoms of bureaucracies—massive hierarchy, institutional conservatism, professed rationality, and entrenched self-interest."[282] This sense of inertia within the Commission, and one of helplessness felt by those on the outside who require FCC approval to enter or stay in business, seem virtually inevitable.

This article's illustrations do however, demonstrate that, in the past, the Commission has been able to achieve significant policy breakthroughs by employing negotiation as a policy tool.[283] Nonetheless, the special circumstances of each proceeding limits the precedential value of prior *ad hoc* negotiations.

Negotiated rulemaking represents one way to institutionalize the success of past negotiation because it is capable of replication. It represents a practical form of communications policymaking and it should be pursued by the FCC. Prior experience with negotiated rulemaking by the Environmental Protection Agency suggests that this approach is a good process that produces an equitable outcome.[284] The FCC's public interest mandate under the Communications Act would thus be served by improving and expanding upon the negotiation process under appropriate circumstances.

The must-carry controversy[285] would have been a perfect situation in which to employ negotiation rulemaking. The release of the revised rules marked the beginning of another round of legal proceedings. Petitions to stay the applications of the rules were filed by a consortium of cable television companies, and were denied by the District of Columbia Circuit Court of Appeals.[286]

---

281 *Id.*, para. 41.
282 E. KRASNOW, L. LONGLEY & H. TERRY, *supra* note 5, at 28.
283 *See supra* notes 13-27 and accompanying text.
284 *See* Susskind and Van Dam, *Squaring Off at the Table, Not in the Courts*, TECH. REV., July 1986, at 36; Susskind, *Mediating Public Disputes*, NEGOTIATION J., Jan. 1985, at 19-20; *see also* Susskind and Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAV. SCI. 255 (1983).
285 *See supra* notes 169-87 and accompanying text.
286 Motion for Stay Denied, Court Order 86-1682 (D.C. Cir. June 8, 1987).

By June, 1987, the must-carry controversy had come full circle. A group of cable system operators jointly asked the D.C. Circuit to find the new must-carry rules unconstitutional on first amendment grounds, the same rationale that the court had used in voiding must-carry rules two years earlier. The rules were in place, but the uncertainty as to whether they would survive a court challenge did not leave the FCC or other interested parties in a better position than they had been in before the rulemaking began. Not surprisingly, the phenomenon of the endless policy loop had arisen again. Resolution of the must-carry controversy seems better suited to negotiated rulemaking since it would involve all interested parties in the decisionmaking process at the outset. Drafting of consensus rules could also serve as a basis for later notice-and-comment procedures governed by the Administrative Procedure Act.[287]

Negotiated rulemaking, in contrast to case-by-case negotiation activities, has an advantage of being a definable policy tool. Implementation of negotiated rulemaking in this instance and in comparable ones could follow the guidelines embodied in the 1982 recommendations of the *Administrative Conference of the United States* ("*Conference*").[288]

---

287 5 U.S.C. § 551 (1982).

288 Recommendations of the Administrative Conference of the United States, Rules and Regulations, 47 Fed. Reg. 30,708 (1982) (codified at 1 C.F.R. § 305.824 (1983)) [hereinafter Recommendations].

These Recommendations include:

The Concept of A Convenor — The convenor's purpose is to conduct a preliminary inquiry to determine the feasibility of employing regulatory negotiation for a given topic, and to "determin[e], in consultation with the agency, who should participate in the negotiations." *Id.* at 142; *see also* Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 70-72 (1982).

The Identity of the Convenor — "The convenor should be an individual, government agency, or private organization, neutral with respect to the regulatory policy issues under consideration. If the agency chooses an individual who is an employee of the agency itself, that person should not be associated with either the rulemaking or enforcement staff." *Recommendations* at 142.

The Resolution of Issues — "[R]esolution of issues should not be such as to require participants in negotiations to compromise their fundamental tenets, since it is unlikely that agreement will be reached in such circumstances." *Id.* at 143.

Limiting Participation — Participants should represent interests that are "significantly affected. . . .negotiations cannot generally be conducted with a large number of [people and] . . . negotiations should ordinarily involve no more than 15 participants." *Id.*

The Role of Agency Representative — "The Agency should be willing to designate an appropriate staff member to participate as representative, but the representative should make clear to the other participants that he or she cannot bind the agency." *Id.*

Subject Matter—

> The subject matter of the proposed regulation may be within the jurisdiction of an existing committee of a non-governmental standards writing organization that has procedures to ensure the fair representation of the respective interests and a process for determining whether the decision actually reflects a consensus among them. If such a committee . . . exists, the convenor

The *Conference* recognized that realization of a constructive solution was often frustrated by traditional rulemaking procedures. Traditionally, participants tend to "develop adversarial relationships with each other causing them to take extreme positions, to withhold information from one another, and to attack the legitimacy of opposing positions."[289] In an attempt to resolve this recurring problem, evident in the above discussion of the must-carry situation, the *Conference* proposed concrete ways to implement regulatory negotiation. The *Conference's* analysis assumed that "opportunities and incentives to resolve issues during rulemaking, through negotiations, would result in an

---

should consider recommending that negotiations be conducted under that committee's auspices instead of establishing an entirely new framework for negotiations.

Id.

Public Notification and Additional Parties —

To ensure that the appropriate interests have been identified and have had the opportunity to be represented in the negotiating group, the agency should publish in the *Federal Register* a notice that it is contemplating developing a rule by negotiation and indicate in the notice the issues involved and the participants and interests already identified. If an additional person or interest petitions for membership or representation in the negotiating group, the convenor, in consultation with the agency, should determine (i) whether that interest would be substantially affected by the rule, (ii) if so, whether it would be represented by an individual already in the negotiating group, and (iii) whether . . . the petitioner should be added to the negotiating group, or whether interests can be consolidated and still provide adequate representation.

Id. at 144.

Meetings of the Negotiating Group — "The negotiating group should be authorized to close its meeting to the public only when necessary to protect confidential data or when, in the judgment of the participants, the likelihood of achieving consensus would be significantly enhanced." *Id. See also* Harter, *supra* at 83-86.

Incorporating a Negotiated Consensus into the Rulemaking Proceeding —

The agency should publish the negotiated text of the proposed rule in its notice of proposed rulemaking. If the agency does not publish the negotiated text as a proposed rule, it should explain its reasons. The agency may wish to propose amendments or modifications to the negotiated proposed rule, but it should do so in such a manner that the public at large can identify the work of the agency and of the negotiating group.

Recommendations, at 144. If the negotiating group cannot "reach a consensus on a proposed rule, . . . they should identify in the report both the areas in which they are agreed and the areas in which consensus could not be achieved." *Id.*

Affording the Negotiating Group an Opportunity to Review Rulemaking Comments — "The negotiating group should be afforded an opportunity to review any comments that are received in response to the notice of proposed rulemaking so that the participants can determine whether their recommendations should be modified." *Id.* It is questionable whether allowing the negotiating group to review the comments would constitute a prohibited *ex parte* contact; in order to achieve certainty, the Commission may have to seek guidance from Congress. *See generally* Brotman, *The Changing Nature of Communications Law Practice*, 9 HASTINGS COMM/ENT L.J. 179, 185-191 (1987).

Final Authority of the Agency — "The final responsibility for issuing the rule would remain with the agency," as it does during traditional informal rulemaking. *Recommendations* at 144.

289 *Id.* at 141.

improved process and better rules."[290]

If such an approach had been utilized after the D.C. Circuit invalidated the must-carry rules, the parties would have had a strong incentive to meet and resolve the controversy. The FCC, rather than taking a passive or reactive role, could have facilitated policy resolution by informing all parties that it would initiate negotiated rulemaking as the first step of its plan to craft a new workable solution.

With negotiated rulemaking under its auspices, the FCC could ensure that all interested parties have notice and opportunity to sit at the negotiating table from the beginning. In the must-carry case, public broadcasters would have been included early on when the industry coalitions held their meetings. Agency intervention at this initial stage can enhance the legitimacy of both process and outcome because the Commission's involvement would prevent a major interest from being excluded.

The negotiated rulemaking process can and should utilize the FCC to encourage political consensus from the outside. This would allow the Commission to focus its efforts on seeking further public comment and improving the substance of a consensus, rather than on developing policies likely to be challenged through subsequent litigation. Moreover, interested parties working together as collaborators, rather than as adversaries, are more likely to generate useful information that can be utilized in the rulemaking record that the FCC compiles.[291]

Negotiated rulemaking could have the effect of shifting both the FCC and outside parties away from adversarial negotiation and toward problem-solving activities designed to minimize stalemates and maximize policy resolution. The FCC need only commit itself to undertaking one negotiated rulemaking as an experiment. If the results are positive, the Commission could undertake another negotiated rulemaking session and build confidence in the process. Negotiated rulemaking need not be employed on a widespread basis in order to be effective. Given the resources necessary to initiate such a process, it seems likely that only the most complex, time-consuming controversies will be likely candidates for negotiated rulemaking. The must-carry controversy is a paradigm for the type of problem for which the negotiated rulemaking process seems most worthwhile.

---

290 *Id.* at 142.

291 Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1874-75 (1981).

VI. CONCLUSION

Negotiation deserves institutional nurturing due to its ability to reduce inertia, prevent adversarial policy loops, as well as to instill a greater sense of legitimacy into the FCC's decisionmaking activities. Past practices suggest that negotiation has created dramatic communications policy results.

Looking toward the future, a logical step would be to make the value of negotiation more explicit through the adoption of negotiated rulemaking. Negotiated rulemaking represents a unique working relationship between the agency and its constituents. It emphasizes a problem-solving approach among interested parties. If negotiated rulemaking is utilized by the FCC under appropriate circumstances, the Commission could focus more on problem-solving and less on crafting decisions based on adversarial arguments that tend to posture rather than deal with substantive policy concerns.

Negotiated rulemaking, as demonstrated by the wide range of FCC negotiation activities highlighted here, recognizes that effective communications policymaking is fundamentally a political process. Compromise may not always serve the best interests of the public, but as former F.C.C. Chairman Newton N. Minow has noted, there may be no better alternative.[292]

---

292 E. KRASNOW, L. LONGLEY & H. TERRY, *supra* note 5, at xi.