

## Chapter Two

# Telecommunications Policy in Institutional Perspective

---

### Introduction

Having summarized the reasons for telecommunications regulation, we now turn to the basic institutional choices that must be confronted in telecommunications policy-making. In so doing, we start from a set of basic questions—why establish a Federal Communications Commission to regulate telecommunications markets? How does such a regulatory agency operate—i.e., what functions does it serve? Why would regulators opt for one particular institutional strategy over another one?

All too often, students and practitioners of telecommunications policy take basic institutional questions for granted, focusing instead on legal or policy issues such as whether the Commission has authority to act in a particular area or whether such actions are prudent. Before evaluating such questions, we will first emphasize the often overlooked issue that *how* the Commission acts can sometimes make or break its ability to deliver on a particular policy goal. We will begin our examination of the institutional perspective at the beginning—how and why the FCC was established in the first place. In reading the story, keep in mind (a point to which we shall turn shortly) that an “independent” regulatory agency was not the only way in which the economic and noneconomic telecommunications policy issues could have been addressed.

We start with an overview of the various institutional choices that Congress confronts in designing a regulatory regime. With those in mind, we drill down into the choice that Congress did make, an expert administrative agency, to highlight some of the institutional choices that must be made about (or within) the agency itself. In so doing, we identify the discrete set of functions performed by the FCC as well as how its legacy structure affects its performance in those areas.

### § 2.A. The Institutional Dimensions of Telecommunications Policy

Government regulation can take a variety of different forms. A core reason why institutional structure and strategies are overlooked by practitioners—as well as scholars—

of telecommunications policy is that the critical “constitutive choices”<sup>1</sup> are taken as a given. It was not a given in the 1920s and 1930s, for example, that the radio spectrum would be regulated by a commission. To be sure, there are powerful virtues that inhere in the capabilities of an expert commission and that commended the Federal Radio Commission (FRC) and then the FCC as the appropriate body to oversee the uses of the radio spectrum.<sup>2</sup> Nonetheless, government regulation of the spectrum could have been achieved through a number of different mechanisms—utilizing courts, legislatures, and/or agencies, on the federal and/or state level. Admittedly, some approaches would have been more complicated than others. For example, leaving spectrum regulation to state entities might have introduced significant coordination, compliance, and enforcement costs because, whether intentionally or not, telecommunication broadcasts frequently cross state lines.<sup>3</sup> That said, the case could be made (and still can) that common law courts—with a tradition of enabling intangible or fluid property rights (e.g., water law)—could best ensure the effective use of the radio spectrum.<sup>4</sup>

For a period in the 1920s, common law courts were in the business of regulating the use of the wireless spectrum.<sup>5</sup> Pointing to such history, Professor Thomas Hazlett has suggested that, had the model of common law adjudication of wireless spectrum been allowed to develop, it would have led to more efficient uses of the wireless spectrum than under the oversight of the FCC.<sup>6</sup> Although often regarded as background law rather than regulation, common law evolution, where the courts come to address a problem that had not previously arisen, is a form of government intervention. Indeed, the same evolution from common law to administrative law can be seen in telephony as well: the English law of common carriage was a feature of the common law long before it was imposed by statute.<sup>7</sup>

Even assuming a preference for regulators with a national purview, there were still a number of options on the federal level. Spectrum regulation could have been left, for example, to a specialized federal court with national jurisdiction (like the Court of Appeals for the Federal Circuit, which hears all patent appeals). Or regulatory authority could have been vested in an agency directly controlled by the President rather than the more independent FCC that eventually was created.<sup>8</sup>

1. Paul Starr, *The Creation of the Media* 4 (2004).

2. See Philip J. Weiser & Dale Hatfield, *Spectrum Policy Reform and the Next Frontier of Property Rights*, 15 Geo. Mason L. Rev. 549 (2008).

3. Spectrum does not respect national boundaries either, and yet we are governed by a federal commission and not a global one. Thus, while countries engage in bilateral coordination (say, between the U.S. and Mexico) as well as multilateral coordination through the International Telecommunications Union, the basic authority over spectrum rests at the national level.

4. Some commentators argue just this. See Peter Huber, *Law and Disorder in Cyberspace* (1997), excerpted in Chapter Twenty-One.

5. See Chapter Three.

6. Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & Econ. 133 (1990), excerpted in Chapter Three.

7. See generally James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225 (2002) (reviewing the history of common carrier law).

8. Interestingly, in 1927 the House of Representatives wanted to leave licensing power with the Secretary of Commerce. The Senate did not, instead preferring an independent regulatory commission. The 1927 Radio Act reflected a compromise between the two. For one year, a geographically balanced five-member commission was to exercise the government’s licensing function; then that function would revert to the Secretary of Commerce. Senator Clarence Dill of Washington, the Senate’s expert on radio and a key figure in drafting the Act, liked the compromise because, understanding both Congress and bureaucracy, he believed “if we ever got a Commission, we would never get rid of it.” Erik Barnouw, *A Tower in Babel* 199 (1966). He was right. Congress ultimately abandoned the provision

There is no ready answer to this basic question of institutional design. The main arguments that carried the day in 1927 were twofold. First, it was widely believed that an independent administrative agency could develop relevant expertise. The argument was that judges are generalists with too few resources at hand, and, though Congress and the executive branch have greater resources at their disposal, they too lack the narrow focus that was thought to enhance the development of sound regulation in this complicated area.<sup>9</sup> Second, it was similarly believed that using an independent agency was the only way to sufficiently insulate spectrum decisions from the political process. An even bigger concern than their lack of expertise was the worry that both Congress and the executive branch were too political. During the period when the FRC and, later, the FCC were created, there was widespread belief that politically insulated expert administrators would do a better job of managing complex regulatory undertakings than would their masters in Congress and the White House.<sup>10</sup>

At the other end of the spectrum, Congress could have given commissioners life tenure and the further accouterments of even greater independence. But that likely would have seemed to be too much insulation. One person’s insulation, after all, is another’s unaccountability. So Congress settled upon a multimember commission, currently with five commissioners each serving a five-year term of office. Replacements for commissioners who leave during their term serve only for the unexpired portion, and there can be no more than a bare majority (three, currently) of commissioners from any one political party. The President nominates commissioners, who are confirmed by the Senate, and designates one commissioner to serve as Chair, which means that the Chair is almost always from the President’s party. These structural details are codified at 47 U.S.C. § 154.

When evaluating matters of institutional design, the first question is whether FCC oversight is appropriate at all. In the world of telecommunications policy, most policy practitioners jump from the premise that there is a policy concern to the conclusion that the FCC should be involved in solving it. But such a step is hardly self-evident. In the case of network neutrality, for example, the Federal Trade Commission (FTC) conducted a study and suggested that the consumer protection side of the issue (i.e., transparency as to how providers are operating) and the competition policy side of the issue (i.e., whether broadband providers are abusing their market position) are well handled by the FTC.<sup>11</sup>

The FTC’s optimistic rhetoric about its potential role in the network neutrality debate did not ultimately lead that agency to play a larger role in resolving such issues. The reasons for the FTC’s lack of action in the network neutrality arena are varied. For present purposes, it suffices to note that conventional wisdom and prevailing practice hold that industry-specific regulatory authorities possess valuable expertise and should take the lead on issues arising within their purview.

---

to return powers to the Commerce Department, and the successor to the “one year agency,” the Federal Communications Commission, remains with us.

9. It is, of course, debatable whether a narrow focus is preferable. After all, what looks like admirable focus to one person may look like blinders to another. And note that, precisely because a narrowly focused agency deals with a smaller number of regulated entities than would an agency with a broader purview, the potential for industry capture may be greater.

10. Although the Federal Radio Commission was created before the New Deal and the FCC was created during it, one commonality between the periods was a belief in the wisdom of governance via independent regulatory commissions. See Joseph B. Eastman, *The Place of the Independent Commission*, 12 Const. Rev. 95 (1928); James M. Landis, *The Administrative Process* (1938).

11. FTC, *Broadband Connectivity Competition Policy* (2007), available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

The institutional side of the network neutrality debate still begs the normative question of why the FCC is uniquely capable of resolving certain types of disputes. To summarize the arguments on both sides of this issue, advocates of authorizing courts to decide matters such as property rights in spectrum or network interoperability issues like those raised in the network neutrality debate emphasize the greater analytical rigor employed by courts and their relative insulation from political pressures.<sup>12</sup> By contrast, those defending the FCC underscore the importance of technical expertise and, in some cases, the importance of making predictive judgments to prevent the relevant harm—say, interference in the use of radio communications or blocking of Internet traffic—from taking place. As a normative matter, this debate goes on. As a matter of practice, however, the primacy of the expert agency in such matters remains intact.

### § 2.B. The Federal Communications Commission

Since the early part of the 20th century, the United States has largely empowered the FCC as the appropriate institution for communications regulation.<sup>13</sup> Before 1934, telegraph, telephone, and radio communications were governed by separate laws and separate governmental bodies. Radio, for example, was first regulated by the Radio Act of 1912, which required all users of the radio spectrum to obtain a license and placed licensing authority with the U.S. Secretary of Commerce.<sup>14</sup>

The thrust of the 1912 Act was to allocate different blocks of spectrum to different users—such as the military, commercial interests, and amateur radio operators—and to prioritize their access to the airwaves. Emergency signals such as marine distress calls had first priority for transmission; military signals came next, followed by commercial uses, and, finally, amateur signals. Fifteen years later, Congress passed the Radio Act of 1927, which repealed the 1912 Act. Like its predecessor, the 1927 Act stipulated that spectrum could be used only upon grant of license. And, for the first time, it formally declared the electromagnetic spectrum to be government property and moved the authority for issuing such licenses from the Secretary of Commerce to a new Federal Radio Commission.<sup>15</sup>

The 1927 Act broadly defined radio communications as “any intelligence, message, signal, power, pictures, or communication of any nature transferred by electrical energy from one point to another without the aid of any wire connecting the points.”<sup>16</sup> Importantly, this legislation formally introduced the requirement that licensees serve the “public interest, convenience, or necessity”<sup>17</sup>—of which there will be considerably more

---

12. We return to this argument in Chapter Twenty-One, in particular with an excerpt from Peter Huber.

13. In many other countries, communications were (and are) provided by government itself. Telephony was often part of a national postal system (under the so-called “PTT”—Post, Telephone, and Telegraph—model) until it became large enough to become its own government agency. On the broadcast side, many governments ran all or many of their nation’s broadcast channels (e.g., the BBC). In the mid-20th century, in fact, the United States was fairly unique in that most broadcasters and telephone networks were privately owned. For a comparative discussion of these different models, see Starr, *supra* note 1.

14. Ch. 287, 37 Stat. 302 (1912) (repealed 1927). Congress had previously passed the Wireless Ship Act, ch. 379, 36 Stat. 629 (1910) (repealed 1954), which required all passenger ships to carry wireless sets.

15. Ch. 169, 44 Stat. 1162 (1927) (repealed 1934).

16. *Id.* at 1173.

17. *Id.* at 1167.

discussion later in the book. The Act did not in any way address wireline communications such as telegraphy or telephony.

Regulation of telephone and telegraph services developed separately from regulation of radio in the early 1900s. For a time, no federal regulation of telephone service existed. The first statute to regulate telephone service was the Mann-Elkins Act of 1910,<sup>18</sup> passed more than 15 years after the original Bell telephone patents had expired and well after numerous independent telephone carriers had entered into competition with the Bell system. The Mann-Elkins Act assigned regulatory jurisdiction over telephony to the Interstate Commerce Commission, which already had authority over the railroads as well as other network services.

The mandate of the Mann-Elkins Act was fairly narrow by current standards. The Act categorized telephone service providers as “common carriers”—i.e., carriers that were “obligated to provide service on request at just and reasonable rates, without unjust discrimination or undue preference.”<sup>19</sup> The ICC’s charge was to enforce these common carrier requirements. The Mann-Elkins Act, however, neither required that telephone carriers file tariffs (rate plans) nor authorized the ICC to implement such a requirement. The Act thus gave the agency very limited authority, and the ICC, in turn, largely adopted a strategy of benign neglect towards telephone service, holding only four proceedings to investigate telephone rates in the years from 1910 to 1934.<sup>20</sup> To be sure, the ICC did try actively to regulate merger and acquisition behavior in the telephone industry. Nonetheless, the ICC was far more concerned with regulating railroads than with regulating telephones and did little to oversee the performance of the telecommunications industry.

The ICC was not the only regulatory authority concerned with telecommunications, however. Unlike radio, telephony was subject not just to federal oversight, but to state regulation as well. State regulators reviewed rates, established accounting rules, and implemented service requirements related to local telephone service. As we will discuss in greater detail in Chapter Eight, the states’ regulatory sphere was strictly limited to intrastate telephone service and its related facilities. But given that the vast bulk of telephone calls were typically “local,” this limitation did not mean that state commissions were weak or insignificant regulatory forces. Even today, the boundary between state and federal regulatory jurisdiction over telephone carriers continues to be an area of important and vigorous dispute.<sup>21</sup>

### § 2.C. Regulatory Integration Under the 1934 Act

The Communications Act of 1934<sup>22</sup> undertook an important organizational task. It extended jurisdiction over telecommunications to an expert agency rather than assigning such jurisdiction to entities that had other concerns, such as the ICC or the Department of Commerce. But instead of creating separate experts for each telecommunications field,

---

18. Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539.

19. *Id.* §§ 7, 12.

20. Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* 215 (2d ed. 1999).

21. We address jurisdictional issues primarily in Chapters Eight and Ten.

22. Communications Act of 1934, 48 Pub. L. No. 73-416, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–615b (2006)).

the 1934 Act provided for a single expert agency with broad purview.<sup>23</sup> The Radio Act of 1927 created a focused agency for spectrum management (the Federal Radio Commission); the 1934 Act, by contrast, created a regulatory agency for telephony and charged that same agency with the duty to regulate the airwaves. In establishing the Federal Communications Commission, the Act abolished the Federal Radio Commission, repealed the Mann-Elkins Act, and put an end to the fragmented jurisdiction that had existed until 1934. As the statute itself explains,

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority hereto granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.<sup>24</sup>

Under the Communications Act, the FCC was charged with promulgating regulations to implement its provisions and interpret the many gaps and ambiguities that appeared throughout the lengthy statute. This implementing role was of immediate and substantial importance. For while the Act incorporated many aspects of preexisting regulation (like the licensing requirements for broadcasters and common carriage obligations for telephone companies), it also markedly increased the scope of federal communications regulation. It was in the exercise of that new authority that the FCC would ultimately find its most significant powers.

The institutional question, of course, overlaps with the broader substantive question, and the interaction of the two helps to produce policy outcomes. As an original matter, either a commission or a court (whether a specialized court or a court of general jurisdiction) could oversee the use of spectrum and ask, as the Communications Act provides, whether one user creates "harmful interference"<sup>25</sup> to other users. Viewed in this light, the comparative institutional competence question can turn on whether a commission or courts possess the necessary expertise to make this judgment.<sup>26</sup> But, in this country, the question of spectrum use has historically gone far beyond the question of interference to also include the type of service that would be provided over the spectrum. Indeed, in

23. This was an open question in certain settings. For example, we will see in Chapter Nineteen that there was considerable doubt over whether the FCC had authority to regulate cable television under the 1934 Act. The Supreme Court ultimately held that it (for the most part) did, and Congress later amended the 1934 Act to make that authority explicit.

24. Communications Act of 1934 § 1 (codified as amended at 47 U.S.C. § 151). The section has been amended twice: in 1937, when the words "for the purpose of promoting safety of life and property through the use of wire and radio communication" were added, and in 1996, when the words "without discrimination on the bases of color, religion, national origin or sex" were added.

25. See, e.g., 47 U.S.C. § 302(a); 47 U.S.C. § 303(y)(2)(C).

26. We will not delve into the issue here, but it merits note that this question is similarly debated in an array of technology policy contexts. In the related context of the ability of antitrust courts to evaluate technical cooperation, Judge Posner has suggested that courts (and agencies) are wanting because "the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly." Richard A. Posner, Antitrust in the New Economy, 68 Antitrust L.J. 925, 925 (2001).

1943, the Supreme Court made clear that the Communications Act did not limit the FCC to the supervision of interference but also tasked it with overseeing how spectrum was used. In particular, Justice Frankfurter wrote in the landmark case of *NBC v. United States* that because "the radio spectrum is not large enough to accommodate everybody,"<sup>27</sup> the FCC is authorized to oversee not merely whether different users are creating undue interference but also whether their use of the spectrum is in the "public interest."

The Congressional mandate that the FCC exercise its "public interest" authority to make judgments about who is worthy to hold a license to use spectrum gave that agency wide discretion. In the wake of the New Deal, there was still considerable confidence that administrative agencies could possess and exercise broad discretion effectively, reflecting what is often called the "wise man" theory of regulation.<sup>28</sup> As Alfred Kahn (a pioneer of airline deregulation and author of the influential book, *The Economics of Regulation*) later put it, however, such a theory overlooks that "the dispensation of favors to a selected few is a political act, not a judicial one."<sup>29</sup> After all, what technical criteria can make clear what economic activities—say, livestock breeding versus dairy inspection, as the FCC decided in a particular case<sup>30</sup>—had a stronger claim on wireless spectrum?

## § 2.D. Institutional Structure and the FCC

Choosing an independent agency does not end the process of making institutional choices. The agency must itself be organized, and the agency must determine the manner in which it will do business. In particular, the agency must decide (self-consciously or not) the manner in which it will make and enforce its policy judgments.

The wise man theory of regulation that governed spectrum regulation for much of the agency's history directly translated into how the FCC was organized to oversee the use of spectrum. In particular, the FCC identified different possible uses of the spectrum and then assigned different units within the Commission to regulate particular uses. Most notably, the Media Bureau oversees licenses to operate TV and radio stations. The International Bureau oversees licenses to operate satellite transmission systems (as such licenses are often related to international treaty obligations). The Wireless Telecommunications Bureau oversees cellular providers. The Office of Engineering and Technology oversees those uses of the wireless spectrum that are authorized without the need to hold a license at all—the so-called "unlicensed uses" of the spectrum, such as Wi-Fi.<sup>31</sup> On the carrier side of the agency, the Wireline Competition Bureau covers wireline telephony while cellular telephony is under the Wireless Telecommunications Bureau.

As a case study in how the internal organization of the agency makes an important difference, consider the operation of the four bureaus involved with overseeing the use of wireless spectrum. As an initial matter, authorizing four different bureaus to oversee spec-

27. *NBC v. United States*, 319 U.S. 190, 212 (1943).

28. Douglas W. Webbink, Frequency Spectrum Deregulation Alternatives 10 (FCC, Working Paper No. 2, 1980), available at [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp2.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp2.pdf). The "wise man" is, of course, the regulator, who "is capable of deciding what is best for the public." *Id.*

29. Thomas K. McCraw, *Prophets of Regulation* 286 (1984).

30. See Petition of Lehigh Coop. Farmers, Inc., Memorandum Opinion and Order, 10 F.C.C. 2d 315 (1967) (selecting the best applicant for a radio license based indirectly on the value of occupations catered to).

31. "Wi-Fi" refers to wireless local area networks that use a particular set of specifications (known as 802.11) developed by the Institute of Electrical and Electronics Engineers, or IEEE.

trum use makes it harder to develop a consistent philosophy and set of practices to manage interference in different contexts. Indeed, the FCC has largely resisted the calls to establish a clear framework to govern what constitutes “harmful interference,” instead leaving the individual bureaus with substantial leeway to fight out and establish rules that protect users against interference within their respective spectrum uses.<sup>32</sup> By contrast, if a single bureau were authorized and required to develop and oversee all uses of spectrum, there would be a natural incentive to develop a more consistent approach to spectrum management. With four different bureaus having a stake in the outcome, however, the internal bureaucratic battles result in a détente that leaves the guiding approach toward spectrum management undefined and leaves each bureau with leeway in managing interference as it sees fit.<sup>33</sup>

The difference between the model of defining and adjudicating a standard such as harmful interference and developing rules specific to each industry may not be immediately apparent. One critical difference is that a firm developing new wireless technologies must—unless it gains access to the category of “flexible use” spectrum authorized for cellular services—ask the FCC to modify the heavily prescribed limitations set forth in the relevant service rules.<sup>34</sup> To appreciate the impact of this system, consider Qualcomm’s service bringing TV programming to mobile phones (MediaFLO).<sup>35</sup> When Qualcomm evaluated its plans for rolling out this service, it determined that MediaFLO might create interference with adjacent services.<sup>36</sup> Given the case-by-case spectrum management process, however, Qualcomm had no clear guidance as to what principles would govern such interference so it petitioned the FCC for guidance.<sup>37</sup> Qualcomm, a company with substantial resources and sophistication about how the FCC operates, was able to submit a petition and receive an answer within twenty months—a relatively fast turnaround for the FCC. For upstarts, however, this sort of entry barrier is enough to destroy a new business concept in its infancy, particularly because competitors can use the process to delay the new offering, hinder its effectiveness (by advocating overly strict limitations), and learn more about it before it hits the market.

32. See, e.g., R. Paul Margie, *Can You Hear Me Now?: Getting Better Reception from the FCC’s Spectrum Policy*, 2003 Stan. Tech. L. Rev. 5.

33. The notable exception was the Spectrum Policy Task Force chartered by Chairman Michael Powell. That effort took an interdisciplinary and systematic look at how spectrum was managed and how interference was treated. Its recommendations, however, were not acted upon. See *Establishment of an Interference Temperature Metric to Quantify and Manage Interference and to Expand Available Unlicensed Operation in Certain Fixed, Mobile, and Satellite Frequency Bands*, Order, 22 FCC Rcd. 8938 (2007) (abandoning effort launched in *Establishment of an Interference Temperature Metric to Quantify and Manage Interference and to Expand Available Unlicensed Operation in Certain Fixed, Mobile, and Satellite Frequency Bands*, Notice of Inquiry and Notice of Proposed Rulemaking, 18 FCC Rcd. 25,309 (2003)).

34. As the U.S. Government Accountability Office reported:  
[F]or most frequency bands FCC allocates, the agency issues service rules to define the terms and conditions for spectrum use within the given bands. These rules typically specify eligibility standards as well as limitations on the services that relevant entities may offer and the technologies and power levels they may use. These decisions can constrain users’ ability to offer services and equipment of their choosing.

JayEtta Z. Hecker, U.S. Gov’t Accountability Office, GAO-06-526T, *Telecommunications: Options for and Barriers to Spectrum Reform* 7 (2006), available at <http://www.gao.gov/new.items/d06526t.pdf>.

35. Qualcomm Incorporated Petition for Declaratory Ruling, Order, 21 FCC Rcd. 11,683 (2006). Qualcomm said it would offer between 50 and 100 local and national channels either in real time or in clip-casting for later viewing. *Id.* at 11,684.

36. See *id.* at 11,685.  
37. See *id.* at 11,683.

The outcome of the Qualcomm matter reveals a core limitation of the FCC’s current system of spectrum regulation. In that matter, the FCC considered establishing a more systematic (and less ad hoc) standard for interference management that would be implemented through a new, streamlined procedure.<sup>38</sup> The FCC declined to do so, however, instead adhering to its traditional public interest, case-by-case determination system.<sup>39</sup> Unfortunately, the FCC’s current system invites rent-seeking (i.e., delay-inducing) behavior by competitors and creates, as Thomas Hazlett put it, “a moral hazard for incumbents who are rewarded for raising interference complaints simply to block competition.”<sup>40</sup> In arguing for a new approach to spectrum management, FCC Chairman Michael Powell cited this very dynamic, condemning how the current system created “interference rules that are barriers to entry, that assume a particular proponent’s business model or technology, and that take the place of marketplace or technical solutions.”<sup>41</sup>

## § 2.E. The FCC in a Functional Perspective

When Congress enacted the Communications Act, it specified a set of titles that regulate particular technologies (e.g., telephone service, radio communications, cable television). As noted above, the FCC has followed this silo-based approach and has established a set of different bureaus to oversee different industry segments (e.g., Wireless, Media, Wireline). From a functional perspective, however, there are certain responsibilities that are handled across and within each bureau. One can thus imagine, and different officials and commentators have suggested, that the agency could be reorganized along functional lines. Tracing out the discussion above, we discuss in this section key functions that the FCC historically and currently performs.

### § 2.E.1. Command and Control

The FCC was established with a mandate to regulate in the public interest using a model of “command and control” regulation. In the case of how spectrum was used and how the monopoly telephone company (AT&T) operated, the FCC instituted rules that limited how regulated companies could operate. Those rules came to be known as “ex ante” regulation, as they required the FCC to authorize ahead of time what actions the regulated firms could take. If a regulated broadcaster or telephone company wanted to offer a new service—say, use its spectrum license differently or offer a new service (e.g., voicemail)—it needed to first ask permission. When a firm requests permission, competitors can oppose the application on any ground, drag out the proceeding, and seek more information about the new service. For an environment in which such events (i.e., the development of a new service) were rare, ex ante regulation constituted a reasonable system for preserving stability and safeguarding against unwanted behavior. For a more dynamic marketplace, however, the limitations of this model become increasingly problematic and costly to society.

The underpinnings of the command and control model of regulation for telecommunications policy began to break down in the 1990s as the industry confronted what is

38. *Id.* at 11,696–97, 11,699.

39. *Id.* at 11,696, 11,700–01.

40. Thomas W. Hazlett, *Liberalizing US Spectrum Allocation*, 27 Telecomm. Pol’y 485, 486 (2003).

41. Michael K. Powell, Chairman, FCC, *Broadband Migration III: New Directions in Wireless Policy*, Remarks at the Silicon Flatirons Telecommunications Program 8 (Oct. 30, 2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-227944A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-227944A1.pdf).

often called technological convergence. Stated simply, technological convergence is the coming together of different services on account of technological change. From the enactment of the Communications Act in 1934 until the 1970s, wires were used to deliver telephone service and wireless spectrum was used to deliver over-the-air radio (and later television) broadcasts. Over the course of the 1980s and 1990s, the telecommunications world was turned upside down: wireless telephone service began to challenge wired telephony, and cable television displaced the once-dominant over-the-air delivery of television programming. By the 2000s, the Internet emerged as the ultimate technological convergence platform: music, video, voice, and data communications were all delivered based on a common set of protocols and could be distributed over any number of broadband connections (cable modem, DSL, or wireless). In short, technological change has upended all of the legacy assumptions and premises that underpinned the classic command and control model of regulation.

Over the last thirty years, the telecommunications world moved from one in which ex ante rules were the norm to one in which more dynamic business models made it difficult to justify the delays that inhere in such a regime. But, as we noted above, the institutional limitations of this change are sometimes overlooked. For instance, in the face of more diverse uses of wireless spectrum, many commentators have called on the FCC to treat spectrum more like traditional property and judge the equivalent of trespass through adjudicative processes.

### § 2.E.2. Rulemaking versus Adjudication

As the discussion above illustrates, institutional structure directly constrains and influences substantive policy decisions. The links between institutional structure and ultimate policy determinations are complex insofar as regulatory agencies can, at least as a theoretical matter, change their institutional strategy to address particular policies. In *SEC v. Chenery Corp.*, the Supreme Court made clear that, absent specific statutory language requiring adjudication or rulemaking, the choice is largely up to the agency.<sup>42</sup> In principle, as in *Chenery* itself, agencies can select adjudication over rulemaking so that they can address statutory problems as they arise.<sup>43</sup>

Adjudications are a significant part of the FCC's docket, as they include actions on possible rule violations, licensing disputes, and other proceedings focused on specific acts or actors. An example would be a hearing to determine whether the broadcast of a particular television program violated the Commission's rules barring indecency. When the FCC implements a statute, however, it usually does so via rulemaking. Congress enacts the statute and leaves some aspect of the statute's administration to the FCC, and the Commission assumes that responsibility by launching a rulemaking process.

The rulemaking process formally begins with the Commission issuing a Notice of Proposed Rulemaking (NPRM). An NPRM lays out the issues it is considering, discusses them, and proposes a response to them (sometimes accompanied by a set of proposed rules). The NPRM requests comments from interested parties on the proposed course of action. Of course, parties often communicate with the Commission before it issues an

42. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

43. *Id.* at 201, 203. The Court noted, however, that whether the decision produced by the adjudication should be given retroactive effect was another matter. *Id.*

NPRM in the hope of influencing these proposals; after an NPRM is issued, however, there is a statutorily mandated comment period to ensure that all interested parties have an opportunity to comment before any regulation is adopted.

In some cases, the Commission takes a prior step by issuing a Notice of Inquiry (NOI). The Administrative Procedure Act does not require, or even mention, NOIs (whereas it requires NPRMs), but agencies sometimes use them when they are not ready to issue an NPRM. An NOI raises the issue to be addressed and invites comments but usually does not propose any particular rules. An NOI generally functions to help the agency gather information on a particular topic.

Sometimes an agency takes no further action on a subject after an NOI, and sometimes it takes no further action after an NPRM. And, of course, most of the ideas suggested to an agency are never the subject of any formal action. But if an agency wants to promulgate a substantive rule, then after issuing an NPRM (whether or not preceded by an NOI), the agency generally must respond to comments, formulate final rules, and write a statement of basis and purpose for those rules. The Commission often calls its documents containing the final rules, responses to comments, and explanation a "Report and Order."

The rulemaking procedure outlined above may sound reasonably streamlined. In practice, however, it often is not. Frequently, the FCC will issue an NPRM or NOI and later (in response to comments, on its own initiative, or in response to external events) decide to issue a further NPRM or NOI, calling for a new round of comments and responses on a defined set of issues. On the back end, a final order might not resolve all outstanding issues and might instead request comment on some additional matters. The result is that many orders are final orders as to some matters and an NPRM or NOI as to others. The possibility of multiple NPRMs and multiple orders, combined with the opportunities for communications to the Commission not only during the official comment period but also before a rulemaking formally commences, makes for a more fluid rulemaking process than one might imagine from merely reading the statutory provisions that govern how the FCC operates.

When a final Report and Order is issued, even that is not the end of the process. A party can petition the FCC for reconsideration, but the Commission rarely grants such requests. This is not surprising. After all, the whole point of soliciting comments after the issuance of proposed rules is to allow parties to present their arguments before final rules are issued. Other avenues for reconsideration are more promising, however. First, Congress can (but rarely does) overturn an FCC decision by legislation. A second and far more common path is for an aggrieved party to file suit challenging the agency action as inconsistent with federal law.

It is not the openings of FCC NPRMs that generally raise concerns, but their conclusions. Rather than reopen proceedings for further comment once the agency identifies a set of model rules, the FCC has historically used the so-called *ex parte* process to focus in on the questions in controversy. For students of the judicial system, the concept of an *ex parte* process will sound like an oxymoron; after all, the judicial system bans such contacts. At the FCC, however, such contacts are allowed, pursuant to a filing submitted by the interested party. That filing is generally far from a full discussion of the relevant issues. Rather, it tends more toward something like "The participants had a full discussion of the issues identified in the NPRM." As such, only those parties who are quite adept at following the debate at the FCC are able to participate in such a process.

To appreciate the FCC's attachment to proceeding by rulemaking, consider the FCC's conduct of the high-profile and self-styled adjudication in responding to Comcast's se-

cret degradation of some peer-to-peer services. In that case, the Commission evaluated whether Comcast complied with the Commission's theretofore nonbinding Internet policy principles.<sup>44</sup> In reaching its conclusion that Comcast had violated these principles, the FCC did not follow any of the traditional elements of an adjudication process—i.e., it did not admit evidence under oath; it did not provide for cross-examinations; it did not evaluate whether expert opinions should be credited as grounded in technical expertise; and it did not find facts. Instead, it used the same process that the agency uses for notice and comment rulemakings. Courts and commentators have long criticized that process. Judge Posner famously observed that “[t]he nature of the record compiled in a notice and comment rulemaking proceeding—voluminous, largely self-serving commentary uncabined by any principles of reliability, let alone by the rules of evidence—further enlarges the Commission's discretion and further diminishes the capacity of the reviewing court to question the Commission's judgment.”<sup>45</sup> With respect to the Comcast matter, FCC Commissioner McDowell dissented from the FCC's order along these very lines, noting, among other things, that “[t]he evidence in the record is thin and conflicting.”<sup>46</sup>

A core institutional challenge for the FCC is to learn from the limitations highlighted by cases like *Comcast* and develop greater adjudicative capabilities. Unfortunately, the FCC's limits in holding adjudications exhibited in the *Comcast* case reflect a deep institutional weakness in how the agency operates. To appreciate this point, consider its treatment of XM and Sirius after years of flagrant violations of the terms of their licenses. In the words of Commissioner Deborah Taylor Tate, Sirius Satellite Radio “failed to comply—knowingly and repeatedly—with the specifications for its FM modulators and the terms of its Special Temporary Authorizations … for more than five years.”<sup>47</sup> These years of lawless behavior did not, however, result in any enforcement proceeding, adjudication, or contested proceeding. Rather, the FCC only took action and entered into a consent decree with the two companies as part of a merger review process, with Sirius agreeing to a “voluntary contribution” of \$2,200,000<sup>48</sup> and XM agreeing to \$17,394,375.<sup>49</sup>

The absence of an effective ex post adjudication process for penalizing legal violations has a number of unfortunate consequences. First, this state of affairs sometimes has the bizarre and unfortunate consequence of leading the agency to accommodate parties who

44. See Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, Memorandum Opinion and Order, 23 FCC Rcd. 13,028 (2008), vacated, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

45. Schurz Commc'ns, Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992).

46. Formal Complaint of Free Press and Public Knowledge Against Comcast Corp., 23 FCC Rcd. at 13,092 (dissenting statement of Comm'r Robert M. McDowell). Commissioner McDowell elaborated on this point, explaining that:

All we have to rely on are the apparently unsigned declarations of three individuals representing the complainant's view, some press reports, and the conflicting declaration of a Comcast employee. The rest of the record consists purely of differing opinions and conjecture.

*Id.* (footnote omitted).

47. Sirius Satellite Radio Inc., Order, 23 FCC Rcd. 12,301, 12,324 (2008) (statement of Comm'r Deborah Taylor Tate).

48. *Id.* (describing the consent decree the FCC entered into with Sirius).

49. XM Radio, Inc., Order, 23 FCC Rcd. 12,325, 12,347 (2008) (statement of Comm'r Deborah Taylor Tate) (describing the consent decree the FCC entered into with XM).

previously violated rules that were not enforced.<sup>50</sup> Second, because enforcement does not proceed in a clear and predictable fashion, many efforts to conduct enforcement processes follow the FCC's traditional model of negotiated solutions (rather than adjudicated results).<sup>51</sup> Third, in what is a self-reinforcing dynamic, the lack of effectively used administrative law judges (ALJs) leads to a lack of confidence in and use of such judges. Indeed, FCC ALJs appear to have decided only three matters since 2005.<sup>52</sup>

### § 2.E.3. Licensing

In the wake of the enactment of the Communications Act, the decision of whether to license a party to use the radio spectrum was invariably an important decision. The grant of a license to use scarce spectrum entitled a firm to a privileged position in the market. In theory, the license came with public interest obligations (see Chapter Six), but enforcement of those obligations was, to put it mildly, uneven. Similarly, licensing decisions were not permanent. A licensee traditionally faced a renewal process whereby it would need to justify its continued merit to hold a license. The renewal process also, with only rare exceptions, involved more theoretical than real scrutiny of the behavior of the license holders. In most cases, the incentives for the agency were clear: if the license renewal was denied, the agency faced a legal and/or political battle. If the agency renewed the license, by contrast, it would find little outcry in all but the most exceptional cases. In 1996, Congress curtailed even the theoretical role for license renewals, enacting into law a presumption that all licenses would automatically be renewed.<sup>53</sup>

In one situation, however, licenses are often subject to serious scrutiny: a merger or acquisition in which a license changes hands. In such cases, the FCC enjoys a parallel role to that of the antitrust authorities (i.e., the Department of Justice and FTC). For both wireless spectrum licenses and licenses to operate wireline facilities, the FCC's oversight over any license transfers has enabled it to conduct its own merger review. This redundancy has generated significant criticism, with former FCC Commissioner Harold Furchtgott-Roth calling for an end to the FCC's role in merger review.<sup>54</sup> We will return to this issue in Chapter Seventeen.

50. See, e.g., Unlicensed Operation in the TV Broadcast Bands, Second Report and Order and Memorandum Opinion and Order, 23 FCC Rcd. 16,807 (2008) (adopting new rules legalizing the unlicensed use of TV spectrum locations that are unused by licensed services); see also Harold Feld, We File Wireless Microphone Complaint: Shure Says Breaking Law Should Be OK if You Sound Good, Wet-machine (July 16, 2008), <http://tales-of-the-sausage-factory.wetmachine.com/content/we-file-wireless-microphone-complaint-shure-says-breaking-law-should-be-ok-if-you-sound-good> (complaining that the FCC should not “reward” users of illegal wireless microphones by offering them priority over authorized users).

51. The practice of treating enforcement actions as a political negotiation is discussed and criticized in a House Commerce Committee majority report. See Majority Staff of H. Comm. on Energy and Commerce, 110th Cong., Deception and Distrust: The Federal Communications Commission Under Chairman Kevin J. Martin 18–19, 23–24 (2008).

52. See generally Office of Admin. Law Judges, FCC, <http://www.fcc.gov/oaj/>.

53. See Telecommunications Act of 1996 § 204, 47 U.S.C. § 309.

54. See Harold W. Furchtgott-Roth, Testimony Before the Antitrust Modernization Commission 93–94 (Dec. 5, 2005) (transcript available at [http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/051205\\_Regulated\\_Industries\\_Transcript\\_reform.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/051205_Regulated_Industries_Transcript_reform.pdf)). For other views, see Rachel E. Barkow & Peter W. Huber, A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers, 2000 U. Chi. Legal F. 29; Donald J. Russell & Sherri Lynn Wolson, Dual Antitrust Review of Telecommunications Mergers by the Department of Justice and the Federal

#### § 2.E.4. Norm Entrepreneur

One of the least publicly appreciated roles played by the FCC (and other government agencies) is that of norm entrepreneur. This role, first suggested by Cass Sunstein,<sup>55</sup> is both significant and controversial. Consider, for example, the network neutrality issue discussed above. For several years, the principal governmental response was Chairman Powell's delivery of a speech setting forth a series of norms for how broadband providers were expected to behave.<sup>56</sup> That effort was significant because it filled a policy vacuum. It was controversial because it neither reflected the pedigree of official agency action nor could bind parties who deviated from the norms.

Whether or not the FCC should act as a norm entrepreneur will continue to be debated. Insofar as the agency uses this authority, it will often do so to catalyze self-regulation by the industry. While the “bully pulpit” or “regulation by raised eyebrow” can catalyze self-regulation,<sup>57</sup> it provides no official oversight. By contrast, a system of “co-regulation” involves the intermingling of official authority and unofficial authority.<sup>58</sup> Notably, by standing with “the shotgun behind the door,”<sup>59</sup> a government agency can enable the private system of dispute resolution to operate more effectively insofar as official accountability will ensure that private regulatory efforts will be genuine and not merely a veneer to mask noncompliance.

#### § 2.E.5. Standard Setting

The FCC’s role in setting standards for telecommunications technologies remains, like its norm entrepreneurship role, a controversial one.<sup>60</sup> Government standard setting is a notoriously difficult act, as it requires government officials to act based on limited expertise (relative to private sector counterparts), susceptibility to political pressures, and less flexibility to respond to market changes. Nonetheless, throughout the history of the telecommunications industry, the FCC has taken this role very seriously, producing what many regard as mixed results.

The least controversial role for government standard setting is in addressing collective action problems to address key social policy concerns, thereby preventing market failure.

---

Communications Commission, 11 Geo. Mason L. Rev. 143 (2002); Bryan N. Tramont, Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy “Voluntary” Agreements, 53 Fed. Comm. L.J. 49 (2000).

55. The term appears to stem from Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996). For a notable use of the term in connection with a government agency, see Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 Vand. L. Rev. 2041 (2000).

56. Michael K. Powell, Chairman, FCC, *Preserving Internet Freedom: Guiding Principles for the Industry*, Remarks at the Silicon Flatirons Symposium: The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age (Feb. 8, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-243556A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf).

57. These concepts are hardly new ones. See H. Thomas Austern, *Expertise in Vivo*, 15 Admin. L. Rev. 46 (1963) (discussing “jaw-bone enforcement” and “the lifted eyebrow”); Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 873.

58. See Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. Davis L. Rev 529 (2009).

59. This concept comes from securities regulation, where official oversight over selfregulatory organizations is a common practice. *See id.* at 552–53, 574.

60. For two thoughtful discussions, see Kathleen M.H. Wallman, *The Role of Government in Telecommunications Standard-Setting*, 8 CommLaw Conspectus 235 (2000); Dale N. Hatfield, Challenges of Network Design in an Increasingly Deregulated, Competitive Market, Remarks at the IEEE International Symposium on Integrated Network Management (Mar. 27, 2003), available at [http://www.ieee-im.org/2003/presentation%20files/RemarksDH\\_IM2003.doc](http://www.ieee-im.org/2003/presentation%20files/RemarksDH_IM2003.doc).

Consider, for example, hearing aid compatibility with the telephone network. The FCC acted under congressional direction to embrace and enforce compliance with an industry standard.<sup>61</sup> In so doing, the FCC addressed a coordination challenge that the carriers themselves had failed to overcome insofar as they did not take the necessary steps to provide a crucial service to an important segment of the population.

A second type of standard setting occurs when an incumbent firm possesses significant market power and interconnection to its platform is necessary to promote competition. We will save for Chapter Eleven a discussion of when such a conclusion is warranted. For now, consider the uncontroversial case, at least historically, of the regulation of AT&T and its unwillingness to provide access to the telephone network for what it called “foreign devices.” After years of litigation and regulatory proceedings, the FCC finally succeeded in establishing what it called its Part 68 rules, which required that AT&T (and other incumbent providers) allow such attachments, provided the attachment producers followed the necessary steps to avoid harm to the network.<sup>62</sup> Indeed, such rules continue to remain in place, which is why many devices have an FCC label verifying that they will not harm a network if connected. The FCC no longer performs the process of certifying compliance with these rules, as it delegated this role in 2000 to a set of authorized private sector bodies.<sup>63</sup>

Government standard setting compliance efforts can take different forms, most notably a focus on compliance with a standard as opposed to a focus on the means of such compliance. For example, the FCC’s Part 15 rules, which merely specify a power limit for unlicensed devices, allow for equipment to use any number of technologies to achieve a specified functional requirement—i.e., that frequency emissions fall within the prescribed power limit and do not interfere with licensed users. The manufacturers of such devices can continually reevaluate the best means for making such devices compliant with the Part 15 rules. By contrast, the government departed from this approach when it adopted a specific technology for digital television. We will discuss the issue of digital television in depth in Chapter Seven, but for present purposes, it bears noting that the government’s choice of a specific technology remains open to serious criticism.

Finally, it bears noting that the FCC generally seeks to follow the modern practice of relying on private sector, voluntary, and consensus-based standards bodies wherever possible.<sup>64</sup> Some scholars have criticized this practice, suggesting that government agencies should be more active in standard setting insofar as delegating authority or relying on private actors lacks democratic legitimacy (a criticism also leveled at norm entrepreneurship).<sup>65</sup> Nonetheless, the FCC has concluded, as it explained in delegating compliance with its Part 68 rules to private bodies, that public management of this function

---

61. Hearing Aid Compatibility Act of 1988, Pub. L. No. 100-394, 102 Stat. 976 (codified as amended at 47 U.S.C. §§ 609–610).

62. Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), First Report and Order, 56 F.C.C. 2d 593, 594–96 (1975), modified, 58 F.C.C. 2d 716 (1976), modified, 58 F.C.C. 2d 736 (1976), aff’d sub nom., N.C. Utils. Comm’n v. FCC, 552 F.2d 1036 (4th Cir. 1977).

63. 2000 Biennial Regulatory Review of Part 68 of the Commission’s Rules and Regulations, Report and Order, 15 FCC Rcd. 24,944 (2000).

64. See Office of Mgmt. & Budget, Exec. Office of the President, Circular No. A-119 Revised, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities (1998), available at <http://www.whitehouse.gov/omb/circulars/a119/a119.html>.

65. See Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 Admin. L. Rev. 813, 816–19 (2000); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 556–64 (2000).

undermines the “goals of reduced governmental involvement in the standards process and expedited development of technical criteria for new technology.”<sup>66</sup> As such, when the FCC considered imposing an interconnection mandate on the AOL instant messaging product (an effort it later abandoned), it chose to rely on a private standard setting body to establish the necessary specifications.<sup>67</sup>

## § 2.F. The Statutory and Broader Institutional Context

The Communications Act of 1934 has been amended numerous times, and several of those amendments have been sufficiently extensive that they are often referred to as Acts in and of themselves, despite being incorporated into the 1934 Act. Principal examples of such amendments are the Cable Communications Policy Act of 1984,<sup>68</sup> the Cable Television Consumer Protection and Competition Act of 1992,<sup>69</sup> and the Telecommunications Act of 1996,<sup>70</sup> all of which amended (among other things) scattered sections of 47 U.S.C.—the location of the 1934 Act. In this book, we will often refer to those laws by their own names, but readers should understand that, as a technical matter, they are statutory amendments to the 1934 Act.

### § 2.F.1. The Structure of the 1934 Act

The 1934 Act is codified at Title 47 of the United States Code and, in turn, divided into seven subchapters or “Titles” of its own. Titles I, IV, V, and VII set forth general provisions that relate either to the FCC itself or to issues that transcend any particular industry sector or category of service. Title I,<sup>71</sup> for example, sets forth general provisions pertaining to the structure, jurisdiction, and operation of the Federal Communications Commission. That title, as we discuss below, plays a special role as it provides the FCC with ancillary jurisdiction authority to act in a “common law-like” fashion to regulate new technologies. Titles IV<sup>72</sup> and V,<sup>73</sup> by contrast, address solely procedural matters, with the former focusing on enforcement jurisdiction and requirements for administrative proceedings and the latter focusing on penalties and forfeitures for violation of regulations under the Act. Title VII of the Act,<sup>74</sup> which is entitled “Miscellaneous Provisions,” covers issues ranging from the President’s emergency powers in this area to closed captioning of video programming. Titles II, III, and VI—the subchapters with which this book will be primarily concerned—differ in that they prescribe distinct sets of regulation for ostensibly distinct categories of services, service providers, and technologies.

66. 2000 Biennial Regulatory Review of Part 68, 15 FCC Rcd. at 24,957.

67. For a discussion of this decision, see Philip J. Weiser, *Internet Governance, Standard Setting, and Self-Regulation*, 28 N. Ky. L. Rev. 822 (2001).

68. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 15, 18, 46, 47, and 50 U.S.C.).

69. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

70. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.).

71. 47 U.S.C. §§ 151–161.

72. *Id.* §§ 401–416.

73. *Id.* §§ 501–510.

74. *Id.* §§ 601–621.

Title II of the Act<sup>75</sup> governs common carriers and thus contains the principal set of substantive provisions pertaining to telephony. The provisions of Title II cover a vast number of topics—from rates, competition, and network interconnection to harassing phone calls, services for the disabled, and the regulation of payphones. Although neither Title II nor any other subchapter of the Communications Act explicitly regulates the Internet, Title II contains provisions that affect network infrastructure essential to the Internet. (The FCC has also regulated the Internet under its Title I ancillary authority.) We will examine many aspects of regulation under Title II (especially Title II as it was amended by the Telecommunications Act of 1996) in Chapters Eight through Twelve of this book. The relation of Title II to the Internet will be discussed in Chapter Nineteen.

Title III of the Act<sup>76</sup> establishes the regulatory regime for radio spectrum and broadcast services. It, too, covers substantial ground, ranging from the licensing of spectrum and construction of radio facilities to more particular regulation of the content of broadcast communications. The most important aspects of Title III for our purposes are those that involve the allocation of spectrum and those that impose restrictions and conditions on the use of that spectrum. We address the many interesting issues arising under Title III in Chapters Three through Seven.

Finally, Title VI<sup>77</sup> addresses “cable services” and, obviously, governs the regulation of cable television as well as many other services provided over the cable infrastructure. Some of the provisions here also extend either implicitly or explicitly to other multichannel video programming distribution (MVPD) systems such as direct broadcast satellite service and video services delivered over the telephone network. The current Title VI was not, of course, part of the original 1934 Act because cable service did not then exist. It was added over time through amendments to the Act, notably in the 1984 and 1992 Cable Acts mentioned above. (Before that time, the FCC relied on its Title I authority to regulate cable television.) We examine the regulation of cable television and related MVPD services in Chapters Thirteen through Sixteen.

Overall, the structure of the Act follows the deceptively simple outlines of the telecommunications industry as Congress found it in 1934. Under Title II of the Act were the “natural monopolies”—the telephone and telegraph companies that transmitted information by wire, operated as common carriers, and should therefore, it was assumed, be subject to classic public utility regulation. As such, Title II envisions a role for the FCC in regulating the entry, rates, and services of common carriers of telephonic communications (especially Bell); auditing their books; and assuring that they provide nondiscriminatory access to all.

Under Title III, the FCC was charged with regulating broadcasting. In 1934, this principally involved overseeing the AM radio stations that were gaining popularity throughout the country and just beginning to link up into networks. A notable role for the FCC was to ensure that these stations did not interfere with each other. It was not long before the FCC began to adopt other regulations related to broadcasting, including ones addressing the content of the transmissions themselves.

Under the Communications Act, broadcasters were not to be regulated as (and indeed did not behave as) common carriers. Rather, broadcasters offered selected programs to appeal to listeners and then sold commercial time to advertisers who thereby gained access

75. *Id.* §§ 201–276.

76. *Id.* §§ 301–399B.

77. *Id.* §§ 521–573.

to those listeners. Title III focused on this commercial radio phenomenon, and thus it portrays a Commission particularly concerned with the licensing process—deciding who should be licensed to broadcast, on what frequencies, and in which communities. Notably, in contrast to Title II, Title III says nothing about controlling rates or providing equal access to broadcast stations.

Today, of course, some firms act like broadcasters but transmit by wire (e.g., cable television), while other firms act like common carriers but transmit through the airwaves (e.g., mobile telephone). As noted above, the phenomenon of providing similar services based on different technologies—say, providing telephone service both by wire and by air—is known as “technological convergence.” In the wake of technological convergence, different titles of the Act may thus apply to a single service, as in the case for mobile telephony where, for example, spectrum licensing provisions from Title III and network interconnection provisions from Title II are both relevant. And a single title of the Act may apply to multiple and very different services, as is plainly the case for Title III which, as we just pointed out, applies both to broadcast television and to cellular telephony. Moreover, in a classic case of technological convergence, networks that were originally used for one kind of service (e.g., video) are now increasingly capable of delivering multiple kinds of services (e.g., video and high-speed data transmission). In short, technological changes—and the Internet in particular, which is a powerful force driving technological convergence—have ensured that the concepts of “broadcaster” and “common carrier” no longer have the unambiguous, objective implications assumed by Congress in 1934.

### § 2.F.2. Other Relevant Statutes and Agencies

To be sure, the Communications Act of 1934 (including its amendments) is not the only statute relevant to the regulation of U.S. telecommunications. As we will see, antitrust and copyright laws have also been very important. The Copyright Act of 1976<sup>78</sup> specifically created compulsory licenses that allow cable operators to retransmit copyrighted content at regulated rates. And the Satellite Home Viewer Improvement Act of 1999<sup>79</sup> amended the Copyright Act to recognize a similar, but not quite identical, compulsory license for providers of direct broadcast satellite service. These provisions of the Copyright Act are considered in Chapter Fourteen. Similarly, one of the most important events in the history of American telecommunications—the breakup of the Bell Telephone System in 1984—resulted not from anything in the 1934 Act, but from an antitrust suit under the Sherman Act.<sup>80</sup> That suit is considered in significant detail in Chapter Nine.

Just as the Communications Act is not the only law relevant for telecommunications in the United States, the FCC is not the only relevant federal agency or authority. The case that broke up Bell was brought by the Antitrust Division of the U.S. Department of Justice (although the FCC was involved). Since 1996, the Department of Justice also has had primary responsibility for reviewing mergers and acquisitions in all sectors of the communications industry. The respective roles of the antitrust agencies and the FCC in telecom mergers will be discussed in Chapter Seventeen.

78. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 2, 15, 17, 18, 26, 28, 39, and 44 U.S.C.).

79. Satellite Home Viewer Improvement Act of 1999, Pub. L. 106-113, app. I, 113 Stat. 1501A-523 (codified as amended in scattered sections of 17 and 47 U.S.C.).

80. Sherman Act, 15 U.S.C. §§ 1–7.

In addition, another executive branch entity, the National Telecommunications and Information Administration (NTIA), located within the Department of Commerce, plays two important roles. First, NTIA and the FCC together determine what parts of the electromagnetic spectrum will be reserved for federal government use;<sup>81</sup> NTIA then manages all the spectrum assigned to the government. In discharging these responsibilities, NTIA relies heavily on advice from the Interdepartment Radio Advisory Committee, which is composed of representatives from the various federal agencies that use the spectrum extensively. Second, NTIA bears principal responsibility for determining presidential policy on telecommunication issues. To this end, NTIA has a substantial research staff and frequently submits comments on major FCC policymaking proceedings.

The above agencies operate within the United States, but one international entity bears mention. Radio waves do not respect geopolitical boundaries, so it is necessary for spectrum allocation in the United States to conform to rules established by the International Telecommunications Union (ITU), an organization established by treaty. Particularly for terrestrial transmission of radio waves, ITU regulations are typically not very confining. Usually, within any range of the spectrum, international standards permit a wide variety of uses. Further, international law does not restrict any spectrum usage within a country so long as that use does not radiate into other countries.

While it is important to note the role of other governmental agencies and departments in regulating telecommunications, the FCC has the overwhelming share of authority in this domain. So, while other regulatory or enforcement entities will enter into the discussions in this book, our principal focus will be on the FCC and its activities.

### § 2.F.3. FCC Discretion and Its Constraints

The Commission enjoys considerable discretion when it comes to guiding spectrum policy. Indeed, section 303 of the Communications Act of 1934 broadly states:

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

- (a) Classify radio stations;
- (b) Prescribe the nature of the services to be rendered by each class of licensed stations and each station within any class;
- (c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate; ...
- (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations ... ; [and]

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention....<sup>82</sup>

This might sound like an enormous degree of discretion—and it is—but, in practice, there are constraints. First, courts have interpreted the “public interest, convenience,

81. See 47 U.S.C. § 902.

82. *Id.* § 303.

or necessity”<sup>83</sup> as itself imposing some limitations on the FCC; indeed, they had to in order to find the agency constitutional, as otherwise this would have been an unconstitutional delegation of the legislative power to an entity outside the legislative branch.<sup>84</sup>

Second, Congress can, and often does, give the FCC more specific mandates in particular contexts, such as legislation enacted in the 1990s requiring that spectrum be assigned via auction (which we discuss in Chapter Five). Third, other statutes—most notably the Administrative Procedure Act<sup>85</sup>—impose additional constraints on agency actions and give individuals the right to sue the agency if it runs afoul of these requirements. So, for example, the FCC is required to follow certain rulemaking procedures that, among other things, give the public ample opportunity to comment on proposed regulations. The Government in the Sunshine Act similarly prohibits three or more Commissioners from deliberating on Commission business unless they announce the meeting seven days in advance and hold the meeting in public.<sup>86</sup> Fourth and finally, the political branches can exercise control over the agency via ad hoc levers, such as reducing the FCC’s budget, refusing to confirm newly appointed commissioners, or subjecting FCC actions to intensive public hearings and debate.

The rules governing suits against the FCC are, by and large, the same as those employed more generally in administrative law. This means that most agency final actions (whether rulemakings or adjudications), and some decisions not to act, can be appealed to a federal court. By statute, the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to hear challenges to most licensing decisions made by the FCC.<sup>87</sup> Almost all other final FCC actions (including, notably, rulemaking proceedings) can be challenged in any United States Court of Appeals,<sup>88</sup> though a disproportionate share are heard by the appeals court in the District of Columbia, where the FCC is located.

Most agency findings of fact, exercises of discretion, and policy judgments are subject to “arbitrary and capricious” review, under the catchall provision of the Administrative Procedure Act that empowers courts to “set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>89</sup> This is fairly lenient review, in which the court will inquire whether the agency based its decision on substantial evidence, considered arguments on the opposite side, and explained the basis of its decision. The courts do not (or at least are not supposed to) substitute their judgments on the merits for those of the agency; such decisions would defeat the purpose of having an expert agency in the first place.

---

83. Note that this formulation, from 47 U.S.C. § 307(c)(1), differs from the one quoted above and refers particularly to broadcasting license renewals.

84. This issue was directly addressed in *NBC v. United States*, 319 U.S. 190 (1943), in which the Supreme Court rejected the argument that “public interest, convenience, or necessity” was unconstitutionally broad. The Court concluded that “the public interest, convenience, or necessity [is] a criterion which is as concrete as the complicated factors for judgment in such a field of delegated authority permit” and that the terms do not convey unlimited powers to the FCC, as they indicate that the FCC should be guided by, for example, “the ability of the licensee to render the best practicable service to the community reached by his broadcasts.” *Id.* at 216 (citations omitted) (internal quotation marks omitted).

85. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.) (establishing processes and standards for agency decisionmaking as well as standards for judicial review of agency decisions).

86. Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552b).

87. See 47 U.S.C. § 402(b).

88. See *id.* § 402(a); 28 U.S.C. § 2342(1).

89. 5 U.S.C. § 706(2).

Legal interpretations made by the agency are subject to a slightly different form of review. When, as is usually the case, the Commission makes such interpretations in a rulemaking, the interpretations are subject to *Chevron* analysis, named for the case *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the court first determines “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter,” and there will be no deference to the agency’s determination. *Id.* at 842–43. But “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute,” *id.* at 843, which entails quite considerable deference to the agency. If the Commission makes a legal interpretation in a more informal context (such as an informal adjudication), then the deference accorded by a federal court will “depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>90</sup>

Suits challenging major FCC actions are frequently filed, and sometimes they meet with success. A sizable percentage of the judicial opinions excerpted in this book, in fact, were brought as challenges to FCC rulemakings.

---

90. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).