

May 30, 2019

Hon. Ajit Pai
Chairman
Hon. Michael O'Rielly
Hon. Jessica Rosenworcel
Hon. Brendan Carr
Hon. Geoffrey Starks
Commissioners
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Dear Mr. Chairman and Commissioners:

We are former officials of the Federal Communications Commission, or scholars who are subject matter experts regarding the organization and functioning of the agency. We hold differing philosophical and policy perspectives when it comes to regulation, so that some of us are described as liberals and some conservatives. Several of us have served in senior leadership roles in the administrations of both major political parties. Collectively we have devoted many decades to assisting the FCC in fulfilling its important mission.

We share your interest in strengthening the FCC's capacity for sound decision-making, in particular by bolstering the role of high-quality economic analysis by the staff. But it is widely recognized that this goal is currently hindered by the continued existence of antiquated "industry silos" in the FCC's internal organizational structure. Below we offer suggestions for reforming the structure, but first we explain why today's silos are a hindrance. We undertake this *pro bono* effort as independent analysts and lack any material interest in the matter.

For generations, our media and telecommunications market participants have been regulated, for the most part, by separate FCC bureaus that remain too narrowly focused on the particular market segments to the exclusion of the broader marketplace. Meantime, nearly all of the markets subject to the FCC's regulatory jurisdiction have evolved, generally in the direction of increased cross-platform convergence and competition. Concomitantly, economic policy issues surrounding them have grown in complexity and depth. Because companies offering essentially substitutable services are often regulated by different bureaus, and thus receive different treatment, the FCC's legacy "silo structure" is no longer viable. Indeed, it undermines the agency's performance of its mission.

Experts have pointed this out repeatedly.¹ But organizational change is daunting, analogous to the restoration of an airplane while it is in flight.

Nonetheless, if the communications marketplace – and those market participants regulated by the Commission – are to operate as efficiently and competitively as possible, and if innovation is not to be chilled, a reorganization of the FCC's internal structure that takes into account today's changed, converged marketplace realities should be implemented. We understand, of course, that many, including some of us, have advocated in favor of a "modernization" or "rewriting" of the Communications Act in light of the dramatic marketplace and technological changes that have occurred since adoption of the Telecommunications Act of 1996. But there is no need for the Commission to delay changes to its own internal organization while awaiting such an update.

A recent law review article suggests one model for the replacement of silos with function-based organization: creating bureaus of Economics and Policy, Licensing and Grantmaking, and Engineering; these three bureaus would replace the Media, Wireless and Wireline bureaus.² While this structure might be an appropriate goal, it might be practical to proceed incrementally. For example, the Wireless and Wireline bureaus could be reformulated into one addressing Universal Service (and perhaps some aspects of pricing), and another addressing competition, pricing related to competition, broadband, technologies, and network deployment for networking services. This would effectively maintain the current bureau divisions while removing their traditional industry silos.

¹ See, e.g., Mark Jamison, Can We Modernize the FCC?, TECH POL'Y DAILY (Feb. 2017), available at <http://www.techpolicydaily.com/communications/can-modernize-fcc/> (last visited May 11, 2019); Randolph J. May, Why Stovepipe Regulation No Longer Works: An Essay on the need for a New Market-Oriented Communications Policy, 58 FED. COMM. L. J. 103, 104 (2006).

² See David Honig, FCC Reorganization: How Replacing Silos with Functional Organization would Advance Civil Rights, 3 U. PENN. J. LAW & PUBLIC AFFAIRS 88 (2018).

A major advantage of moving past silos is that it should facilitate the elevation of economics and cost-benefit analysis in Commission decision-making, while also facilitating a culture of evidence-based policymaking.³ The FCC's slow speed at replacing "beauty contests" with auctions – and before that, in the deregulation of AT&T in the years before the MFJ – can be traced to the insularity of industry regulators and the dearth of independent economic analysis in Commission decision-making.

Function-based organization renders "agency capture" less likely, as one firm or group of firms that claim only to be seeking a "level playing field" is disabled from dominating "its" bureau with lobbying campaigns and the revolving door.

Moreover, function-based organization should advance opportunities for minorities and women in FCC-regulated industries. It would accomplish this by ensuring that each nondiscrimination regulation - those now covering transactions, advertising, procurement and employment - would apply across *all* FCC-regulated industries.⁴

A rare opportunity for FCC reorganization might be found in the Commission's plan to relocate its staff to East Capitol Street. If past relocations are a guide regarding what we may expect, many employees will use this opportunity to retire or take jobs in the private sector – thereby creating an opportunity for a relatively painless restructure of the agency.

To facilitate a transformation from silos to function-based organization, there are two immediate steps the Commission should take:

First, it should open a rulemaking or other appropriate proceeding seeking comment on the issues raised in this letter.

Second, it should convene a special advisory committee, with a charge somewhat similar to those given the Ash Council, Landis Report, and Hoover Commission,⁵ to study how reorganizations have been accomplished in other federal agencies, in state public utility commissions, and in foreign governments' counterparts to the FCC in nations such as Japan, Germany, France and the U.K. The Advisory Committee should also recommend an optimal structure for the FCC going forward – one that facilitates platform neutrality on attributes that ought to be neutral (such as civil rights) while eschewing neutrality for its own sake when it inhibits innovation and business opportunity.

We stand ready to assist and support the Commission should it undertake this highly consequential work in the public interest.

Respectfully,

Henry Geller	Randolph May
Thomas W. Hazlett	Henry Rivera
David Honig	Kenneth Robinson
Mark Jamison	Deborah Taylor Tate
Deborah Lathen	Nicol Turner-Lee
Jane Mago	

³ For a discussion of evidence-based policy and the recommendations of the bipartisan U.S. Commission on Evidence-Based Policymaking, *see* Robert Hahn, Building upon foundation for evidence-based policy," 364 SCIENCE 534, 535 (May 10, 2019).

⁴ *Id.* at 100.

⁵ *See* PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK 14 (1971) [Ash Council Report] (recommending a strong chair but recommending no changes in the agency's bipartisan, multimember structure and not addressing bureau organization); SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE S. COMM. ON THE JUDICIARY, 86th Cong., REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 65 (Comm. Print 1960) (authored by James M. Landis) [Landis Report] (recommending a strong chair accountable directly to the President, but not addressing bureau organization); COMM. ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, THE INDEPENDENT REGULATORY COMMISSIONS, A Report to Congress, 5-6 (1949) [hereinafter Hoover Commission Report] (recommending a strong executive chairman but not calling into question the underlying multimember commission model or addressing bureau organization).

ANNEX

All signators are participating in their individual rather than institutional capacities. The signators may be contacted through David Honig (as rapporteur), at david@davidhonig.org.

- **Henry Geller** served as Deputy General Counsel of the FCC during the Kennedy administration and as General Counsel in the Johnson and Nixon administrations. In the Carter administration he served as the Assistant Secretary of Commerce for Telecommunications and Information. Thereafter he founded and operated the Washington Center for Public Policy Research. Mr. Geller has served as a mentor to three generations of public interest telecommunications lawyers.
- **Thomas W. Hazlett** is the Hugh H. Macaulay Endowed Professor of Economics at Clemson University, where he directs the Information Economy Project. He is also a Senior Fellow of the Telecommunications Policy Research Conference and a CITI Fellow at Columbia University. His most recent book, *The Political Spectrum: The Tumultuous Liberation of Wireless Technology, from Herbert Hoover to the Smartphone* (Yale, 2017), was featured as one of the top tech books of the year at CES 2018.
- **David Honig** is President Emeritus and Senior Advisor of the Multicultural Media, Telecom and Internet Council (MMTC), which he co-founded in 1986. He has represented over 80 NGOs in FCC rulemaking proceedings or appeals, and created MMTC's three fellowships, media/telecom brokerage, and two policy conferences. A Floridian, he serves *pro bono* as Chief Counsel of the Florida NAACP.
- **Mark Jamison** is the director and Gunter Professor for the Public Utility Research Center at the University of Florida and is a Visiting Scholar with the American Enterprise Institute. He has taught telecommunications regulation to regulators from over 150 countries and served on the Trump transition team for the Federal Communications Commission in 2016-17.
- **Deborah Lathen** is the President of Lathen Consulting and the Chair of the MMTC Policy Committee. Previously she served on the Board of Directors of British Telecom, as Chief of the FCC's Cable Services Bureau, and as a corporate, finance, and regulatory attorney.
- **Jane Mago** served in various legal and policy roles at the FCC from 1978 until 2004. She served in many managerial positions including General Counsel, Chief of Strategic Planning and Policy Analysis and Deputy Chief of the Enforcement Bureau, which she helped establish.
- **Randolph May** is Founder and President of the Free State Foundation, an independent, non-profit free market-oriented think tank founded in 2006. From 1978 to 1981, Mr. May served as Assistant General Counsel and Associate General Counsel at the FCC. He is a past Chair of the American Bar Association's Section of Administrative Law and Regulatory Practice and a Fellow of the National Academy of Public Administration. He also has served as a Public Member of the Administrative Conference of the United States and currently is a Senior Fellow at ACUS. He is the author, co-author, and co-editor of seven books.
- **Henry Rivera**, a partner at Wiley Rein LLP, served as an FCC Commissioner from 1981-1985, and as chair of several FCC advisory committees, including the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications and the Advisory Committee on Diversity for Communications in the Digital Age. Mr. Rivera also served as President of the FCBA and as the FCBA's Delegate to the ABA House of Delegates. For 25 years, Mr. Rivera chaired the Minority Media and Telecommunications Council (now the Multilingual Media, Telecom and Internet Council), and he is now MMTC's Chair Emeritus.
- **Kenneth Robinson** served as senior policy adviser to four Assistant Commerce Secretaries for Communications & Information (NTIA) and one FCC Chairman. He also worked with the Justice Department's Antitrust Division on satellite, telephone, broadcast, cable, and postal deregulation. As a law student, he worked with President Johnson's Rostow Task Force on Communications Policy (he and Harrison Sheppard were the Western Union "authorities").

- **Deborah Taylor Tate** is the Administrative Director of the Administrative Office of the Courts of Tennessee. From 2005-2009, she served as an FCC Commissioner, and was the first Special Envoy for Children at the ITU in Geneva. Commissioner Tate served as Chair of both the Federal-State Joint Board on Universal Service, the Federal-State Joint Board on Jurisdictional Separations, and as the Federal Chair of the Federal-State Joint Conference on Advanced Telecommunications Services (706 Board). Previously Commissioner Tate served as Chairman and Director of the Tennessee Regulatory Authority.
- **Nicol Turner-Lee** is a fellow in the Brookings Institution's Center for Technology Innovation and a contributor to TechTank. Formerly she served as Vice President and Chief Research and Policy Officer of MMTTC and as the Vice President and the first Director of the Media and Technology Institute at the Joint Center for Political and Economic Studies.

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