

**GAO**

Report to the Chairman, Subcommittee  
on Telecommunications and the  
Internet, Committee on Energy and  
Commerce, House of Representatives

September 2007

## TELECOMMUNICATIONS

# FCC Should Take Steps to Ensure Equal Access to Rulemaking Information





Highlights of [GAO-07-1046](#), a report to the Chairman, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives

## Why GAO Did This Study

The Federal Communications Commission (FCC) is charged with regulating interstate and international communications by radio, television, wire, satellite, and cable. The Telecommunications Act of 1996 established that FCC should promote competition and reduce regulation to secure lower prices and higher-quality services for American consumers. FCC implements its policy aims through rulemaking, whereby the agency notifies the public of a proposed rule and provides an opportunity for the public to participate in the rule's development. These rulemakings are documented within a public docket that contains the rulemaking record.

In response to a congressional request on FCC rulemaking, GAO (1) described FCC's rulemaking process; (2) determined, for specific rulemakings, the extent to which FCC followed its process; and (3) identified factors that contributed to some dockets and rulemakings remaining open. GAO reviewed recent FCC rules, interviewed FCC officials and stakeholders, and conducted case studies of rulemakings.

## What GAO Recommends

To ensure transparency in the rulemaking process, GAO recommends that the FCC Chairman take steps to ensure equal access to rulemaking information. FCC took no position on GAO's recommendation.

[www.gao.gov/cgi-bin/getrpt?GAO-07-1046](http://www.gao.gov/cgi-bin/getrpt?GAO-07-1046).

To view the full product, including the scope and methodology, click on the link above. For more information, contact Mark Goldstein at (202) 512-2834 or [goldsteinm@gao.gov](mailto:goldsteinm@gao.gov).

# TELECOMMUNICATIONS

## FCC Should Take Steps to Ensure Equal Access to Rulemaking Information

### What GAO Found

FCC's rulemaking process includes multiple steps as outlined by law, with several opportunities for public participation. FCC generally begins the process by releasing a Notice of Proposed Rulemaking and establishing a docket to gather information submitted by the public or developed within FCC to support the proposed rule. Outside parties may meet with FCC officials but must file a disclosure in the docket, called an ex parte filing, that includes any new data or arguments presented at the meeting. FCC analyzes information in the docket and drafts a final rule for the commission to adopt. The FCC chairman decides which rules the commission will consider and whether to adopt them by vote at a public meeting or by circulating them to each commissioner for approval. Stakeholders unsatisfied with a rule may file a petition for reconsideration with the commission or petition for review in federal court.

FCC generally followed the rulemaking process in the four case studies of completed rulemakings that GAO reviewed, but several stakeholders had access to nonpublic information. Specifically, each of the four rulemakings included steps as required by law and opportunities for public participation. Within the case studies, most ex parte filings complied with FCC rules. However, in the case studies and in discussions with other stakeholders that regularly participate in FCC rulemakings, multiple stakeholders generally knew when the commission scheduled votes on proposed rules well before FCC notified the public. FCC rules prohibit disclosing this information outside of FCC. Other stakeholders said that they cannot learn when rules are scheduled for a vote until FCC releases the public meeting agenda, at which time FCC rules prohibit stakeholders from lobbying FCC. As a result, stakeholders with advance information about which rules are scheduled for a vote would know when it is most effective to lobby FCC, while stakeholders without this information would not.

The complexity and number of rulemakings within a docket and the priority the commission places on a rulemaking contribute to dockets and rulemakings remaining open. The commission determines when to open and close a docket and which rulemakings are a priority; therefore, the commission determines how a docket and rulemaking progress. Dockets and the rulemakings within them may remain open because the dockets are broad and include multiple rulemakings, or because the commission has not yet voted to close the dockets even though they include completed rules. Within dockets, some rulemakings may remain open because they involve complex, technical issues or because competing priorities can force FCC officials to work on one rulemaking as opposed to another. Stakeholders generally said they are not concerned about the number of open dockets.

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## Abbreviations

APA	Administrative Procedure Act of 1946
DTS	distributed transmission systems
ECFS	Electronic Comment Filing System
FCC	Federal Communications Commission
ILEC	Incumbent Local Exchange Carrier
NPRM	Notice of Proposed Rulemaking
R&O	report and order

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United States Government Accountability Office  
Washington, DC 20548

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September 6, 2007

The Honorable Edward J. Markey  
Chairman  
Subcommittee on Telecommunications  
and the Internet  
Committee on Energy and Commerce  
House of Representatives

Dear Mr. Chairman:

Federal Communications Commission (FCC) regulations potentially affect the daily lives of every American, from rules governing who may own the morning newspaper to the networks connecting the last long-distance telephone call at night. These regulations have a direct influence on how consumers and businesses access telecommunications and media services by, for example, providing the regulatory framework for the digital broadcasting transition, facilitating the deployment of broadband services, and fostering competition to achieve a wider range of communications services. FCC-regulated industries provide Americans with daily access to local and long-distance communications services, mobile telephone services, broadband Internet services, and free over-the-air radio and television broadcasts. FCC also serves other important public interests, working to ensure that Americans have access to 911 services, that emergency responders can communicate effectively to provide for public safety, and that underserved (typically, rural or low-income) areas have access to reasonably priced communications services.

The Communications Act of 1934 (Communications Act) established FCC as an independent regulatory agency responsible to Congress. The Communications Act, which the Telecommunications Act of 1996 (Telecommunications Act) substantially revised, tasks FCC with regulating methods of electronic communication to foster a competitive environment, with an emphasis on the public interest. To implement the intent of these and other laws, FCC makes regulations (or rules) through a process that is largely defined in law. This process requires FCC to provide the public with notice of its proposed and final rules and with an opportunity to comment as the rules are developed. All comments and information gathered by FCC constitute the public record to support rulemakings and are electronically maintained in a docket. A docket may

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address a number of issues, and, as a result, there may be several rulemakings within one docket.

Seeking information about FCC's efforts to maintain transparency and opportunities for public participation, you asked us to review FCC's rulemaking process. Accordingly, this report (1) describes FCC's rulemaking process; (2) determines, for specific rulemakings, the extent to which FCC followed its process; and (3) identifies factors that contributed to some dockets and rulemakings remaining open.

To describe FCC's rulemaking process, we reviewed FCC documents and applicable laws and interviewed FCC officials and representatives from industry and public interest organizations that have participated in FCC rulemaking proceedings. These proceedings are known as "informal" or "notice and comment" rulemakings. We also (1) gathered and analyzed available data on FCC rulemaking orders published in the *Federal Register* over the 5-year period from 2002 through 2006—we refer to these rules throughout this report as "recent rules"—and (2) reviewed selected U.S. Courts of Appeals opinions that addressed challenges to these orders.<sup>1</sup> To determine the extent to which FCC followed its process for specific rules, we selected four of FCC's rules published between 2002 and 2006 as case studies.<sup>2</sup> Each of these rules originated in a different bureau—Media, Wireless Telecommunications, or Wireline Competition—or in FCC's Office of Engineering and Technology. These bureaus and office had the most rulemakings during the period of our analysis. We also based our selection of rules on why the rules were initiated, how long they took to complete, and whether they were challenged in court. To help identify factors that may contribute to dockets and rulemakings remaining open, we selected four rulemakings for case studies from a list of ongoing rulemakings that FCC publishes in the *Federal Register* every 6 months. We selected these cases from the three bureaus and one office that conducted the most rulemakings during the 5-year period from 2002 through 2006.<sup>3</sup> We also selected these rules to include rules that were

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<sup>1</sup>Throughout this report, we refer to each of these rulemaking orders as a "rule."

<sup>2</sup>While these rulemakings are not generalizable, the case studies provide context for understanding the rulemaking process.

<sup>3</sup>We selected cases from FCC's Media, Wireless Telecommunications, and Wireline Competition Bureaus and from the Office of Engineering and Technology; we excluded the International Bureau from the scope of this review. See appendix I for additional information on our scope and methodology.

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initiated in different ways and had been open for different lengths of time. For all case studies, we reviewed and analyzed the rulemaking records and interviewed FCC officials and stakeholders involved in the rulemakings. The findings in our case studies cannot be generalized to all FCC rulemakings. We determined that these data were sufficiently reliable for our review. We conducted our review from October 2006 through July 2007 in accordance with generally accepted government auditing standards. A detailed discussion of our scope and methodology appears in appendix I.

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## Results in Brief

FCC's rulemaking process includes multiple steps as outlined by the Administrative Procedure Act of 1946 (APA) and other laws, with several opportunities for public participation. FCC initiates rulemaking in response to a statute, a petition for rulemaking, or its own initiative. Any person may petition FCC to amend rules or create new rules. FCC generally begins a rulemaking by releasing a Notice of Proposed Rulemaking (NPRM), and then gathers and analyzes information submitted by public participants or developed within FCC to support a rule, leading to a final rule for the commission to adopt. The public may participate in the development of the rulemaking record by filing comments on FCC's notices, filing replies to other parties' comments, and meeting with FCC officials. Outside parties that discuss rulemakings with FCC must file a disclosure in the public record, called an ex parte filing, including any new data or arguments presented during the meeting. The FCC chairman controls the commission's agenda and decides when and how to adopt rules. The commission may adopt final rules either by vote at a monthly public meeting or by circulating the proposed final rules to each commissioner for approval. Stakeholders unsatisfied with an FCC rule may file a petition for reconsideration with the commission or petition for review in the U.S. Courts of Appeals. Twenty-five of the 240 substantive FCC rules published in the *Federal Register* from 2002 to 2006 were challenged in court and had published court opinions; 19 of these challenges were denied; and 6 rules, either wholly or in part, were determined to be unlawful or sent back to FCC for further consideration. In addition, according to FCC data, challenges to 12 of the 240 recent rules are pending in the U.S. Courts of Appeals.

FCC generally followed its rulemaking process in the four case studies of completed rulemakings we reviewed, but we found that some stakeholders had access to nonpublic information that could give them an advantage in the rulemaking process. Specifically, each of the four rulemakings included items that are required by law and FCC regulations

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and provided opportunities for public participation. Within our case studies, we found that most—but not all—ex parte filings complied with FCC's ex parte rules, and there was no evidence that FCC violated its rule prohibiting outside contact about items scheduled for a vote after the agenda for a public meeting was released. However, we also were told by 9 of 12 stakeholders—both those involved with our case studies and stakeholders who regularly participated in FCC rulemakings—that they knew when proposed rules were scheduled for an upcoming vote well before FCC released the agenda to the public because they hear this information from FCC bureau staff and commissioner staff. This advance information is not supposed to be disclosed outside of FCC. Three stakeholders with whom we spoke told us that they cannot learn when rules are scheduled for a vote until the agenda is publicly available. Once the agenda is public, FCC rules generally prohibit stakeholders from lobbying FCC. As a result, stakeholders with advance information about which rules are scheduled for a vote would know when it may be most effective to present their arguments to FCC, while stakeholders without access to this information may not. We are recommending that FCC take steps to ensure equal access to information by making sure that nonpublic information is safeguarded from disclosure, and to determine what actions FCC should take if a prohibited disclosure is made, so that all stakeholders have the same information to inform their participation in the rulemaking process. FCC took no position on our recommendation.

The complexity and number of rulemakings within a docket and the priority the commission places on a rulemaking may all contribute to dockets and rulemakings remaining open. FCC tracks open dockets, which may contain one or more rulemakings. FCC has 133 open dockets, as reported in the *Federal Register* in December 2006. The commission determines when to open and close a docket and which rulemakings are a priority; therefore, the commission determines how a docket and rulemaking progress. Through our analysis of the four open dockets we selected as case studies, we found several factors that may contribute to these dockets, and the rulemakings within these dockets, remaining open. Specifically, some dockets may remain open because they are broad dockets intended to include multiple rulemakings or because the commission has not voted to close the docket, even though the docket includes only completed rulemakings that have addressed all of the issues in the docket. Within dockets, some rulemakings may remain open because they involve complex, technical issues, such as worldwide coordination of satellite systems, or because competing priorities can force FCC officials to work on one rulemaking as opposed to another.

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Stakeholders generally told us that they are not concerned about the number of open dockets and are satisfied with the rulemaking process.

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## Background

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### Purpose and Organization of FCC

Established by the Communications Act, FCC is charged with regulating interstate and international communications by radio, television, wire, satellite, and cable.<sup>4</sup> The Telecommunications Act, which substantially revised the Communications Act, established that FCC should promote competition and reduce regulation to secure lower prices and higher-quality services for American telecommunications consumers and should encourage the rapid deployment of new telecommunications technologies.<sup>5</sup> The law grants FCC broad authority to execute its functions. FCC implements its policy initiatives through a process known as rulemaking, which is the agency process for implementing, interpreting, or prescribing law or policy.<sup>6</sup> Figure 1 shows some common communications services affected by FCC rulemaking.

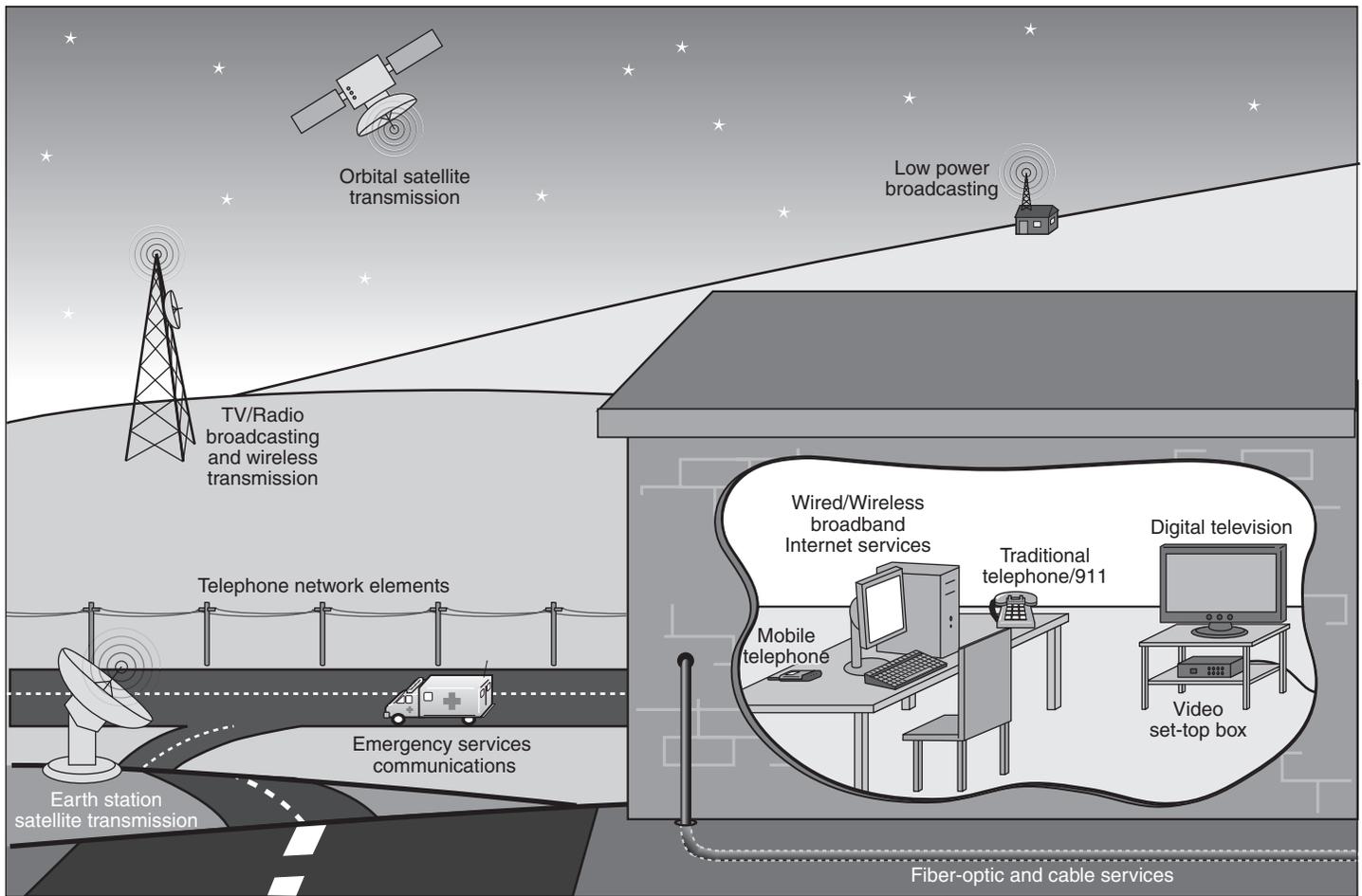
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<sup>4</sup>47 U.S.C. § 151.

<sup>5</sup>Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>6</sup>5 U.S.C. § 551(4) & (5).

**Figure 1: Examples of Communications Services Affected by FCC Rulemaking**



Source: GAO.

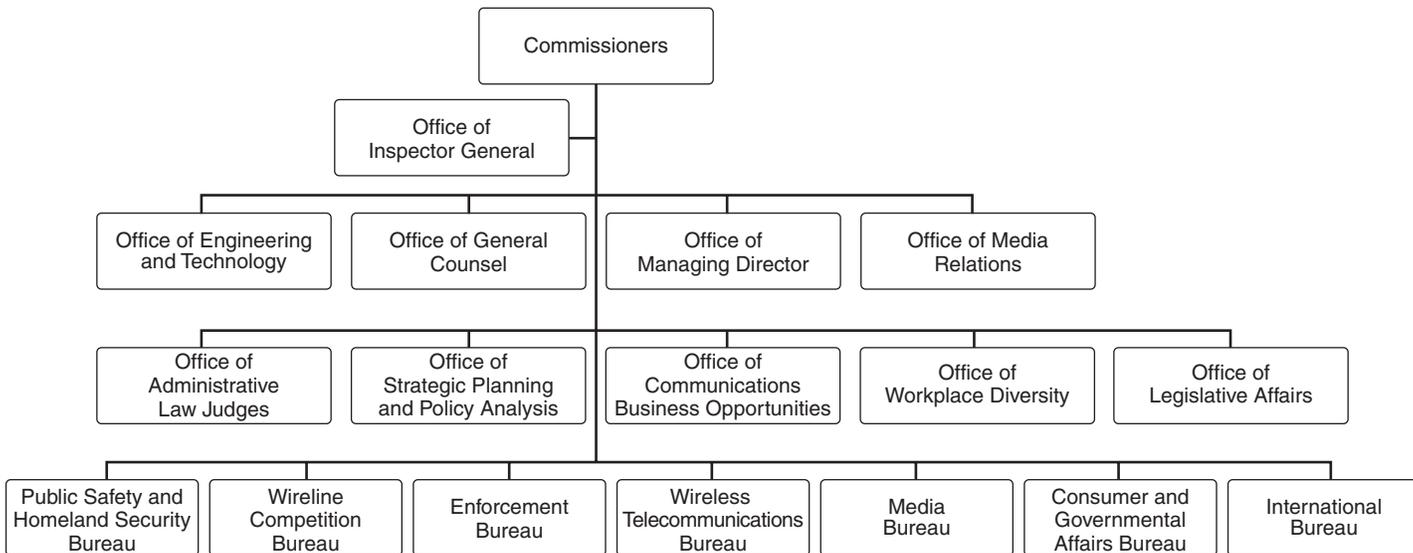
FCC is an independent regulatory agency that must follow many, but not all, federal laws related to rulemaking.<sup>7</sup> Under the Communications Act, the commission is composed of five commissioners appointed by the President with Senate confirmation. The President designates one of the commissioners as chairman.<sup>8</sup> The chairman derives authority from

<sup>7</sup>As used in this report, the term “independent regulatory agency” refers to an agency, such as FCC, established to be more independent of the President and identified as such in the Paperwork Reduction Act. 44 U.S.C. § 3502(5).

<sup>8</sup>47 U.S.C. § 154.

provisions in the act and FCC's rules, which define the chairman's duties to include (1) presiding at all meetings and sessions of the commission, (2) representing the commission in all matters relating to legislation and before other government offices, and (3) generally coordinating and organizing the work of the commission. The commissioners delegate many of FCC's day-to-day responsibilities to the agency's 7 bureaus and 10 offices (see fig. 2). While this report focuses on the rulemaking process, FCC also makes decisions on many other issues, such as enforcement actions and issuing licenses for communications devices. Between 2002 and 2006, FCC data show that the agency made 1,835 decisions by FCC commissioners and 17,406 decisions within FCC bureaus and offices.

**Figure 2: FCC Organization**



Source: FCC.

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## Laws Governing FCC Rulemaking

### Administrative Procedure Act of 1946

APA is the principal law governing how agencies make rules.<sup>9</sup> The law prescribes uniform standards for rulemaking, requires agencies to inform the public about their rules, and provides opportunities for public participation in the rulemaking process. Most federal rules are promulgated using the APA-established informal rulemaking process, also known as “notice and comment” rulemaking.<sup>10</sup> APA outlines a multistep process to initiate and develop rules and includes provisions for parties to challenge them, which FCC must follow. Many steps require agencies to provide public notice of proposed or final actions as well as provide a period for interested parties to comment on the notices—hence the “notice and comment” label.<sup>11</sup> APA does not generally address time frames for informal rulemaking actions, limits on contacts between agency officials and stakeholders, or requirements for “closing” dockets.

### Communications Act of 1934

The Communications Act outlines procedures for addressing petitions for reconsideration by FCC and appeals to federal court for FCC rules.<sup>12</sup> The act states that a petition for reconsideration may be filed within 30 days of the date of public notice. The U.S. Courts of Appeals have jurisdiction to review all final FCC rules.<sup>13</sup>

### Other Laws

Other laws and orders also apply to FCC rulemakings, including but not limited to the following:

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<sup>9</sup>5 U.S.C. § 551, et seq.

<sup>10</sup>In contrast, “formal” rulemaking is a trial-type procedure for making a rule on the record following an agency hearing. Formal rulemaking is used less often than informal rulemaking.

<sup>11</sup>APA provides exceptions to notice and comment, including when the agency finds for good cause that those procedures are impracticable, unnecessary, or contrary to public interest. 5 U.S.C. § 553(b)(3)(B).

<sup>12</sup>47 U.S.C. §§ 405 and 402, respectively.

<sup>13</sup>In certain cases, appeals to FCC rules must be made only to the U.S. Court of Appeals for the D.C. Circuit. 47 U.S.C. § 402(b).

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- *Regulatory Flexibility Act.*<sup>14</sup> This act requires federal agencies to assess the impact of their forthcoming regulations on small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. The act also requires rulemaking agencies to publish a “regulatory flexibility agenda” in the *Federal Register* each October and April, listing regulations that the agency expects to propose or promote and that are likely to have a significant economic impact on a substantial number of small entities.<sup>15</sup> This requirement, as well as a similar requirement in Executive Order 12866, is generally met with entries in the *Unified Agenda of Federal Regulatory and Deregulatory Actions*. The *Unified Agenda* is published twice a year in the *Federal Register* and provides uniform reporting of data on regulatory activities under development throughout the federal government.
  - *Congressional Review Act.*<sup>16</sup> This act requires agencies to submit final rules to Congress and GAO before they can take effect. We compile and make available on our Web site basic information about the rules we receive through an on-line database, including the rule’s priority, listed as either “significant/substantive” or “routine/info/other” as indicated by the agency’s submission.<sup>17</sup> According to the GAO database, 240 significant/substantive FCC rules were published in the *Federal Register* between January 2002 and December 2006.<sup>18</sup>

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<sup>14</sup>5 U.S.C. §§ 601-612.

<sup>15</sup>5 U.S.C. §§ 601-612.

<sup>16</sup>5 U.S.C. §§ 801-808.

<sup>17</sup>Substantive rules, which are generally subject to APA’s notice and comment requirements and have the force and effect of law, are issued by an agency to implement statutory policy. They are essentially any rule that is not a one-time ruling, an interpretive rule, or a rule relating to agency policy or procedure. When reporting rules to GAO, agencies may also categorize rules by priority, such as “economically significant,” “significant,” or “substantive, nonsignificant.” Lower-priority rules, identified as “routine and frequent,” are those rules resulting from a multiple recurring application of a regulatory program that does not alter the body of the regulation. For FCC, such routine rulemakings generally constitute the allotment of broadcast channels, which require revision of the tables of allotment, which are part of the *Code of Federal Regulations*. Certain rules designated as “major” by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget may have their effective date delayed by 60 days after the date of publication in the *Federal Register* or submission to Congress or GAO, whichever is later. The term “major rule” does not include any rule promulgated under the Telecommunications Act and amendments made by that act. 5 U.S.C. § 804(2).

<sup>18</sup>This information was reflected in the GAO Web database of rules as of February 1, 2007.

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- *The Government in the Sunshine Act of 1976 (Sunshine Act).*<sup>19</sup> This act requires federal agencies headed by a collegial body composed of two or more individual members, such as FCC, to hold regular public meetings with sufficient public notice that the meeting will take place.<sup>20</sup> The agency must release the meeting’s agenda, known as the Sunshine Agenda, no later than 1 week before the meeting. In addition, the act prohibits more than two of the five FCC commissioners from deliberating with one another to conduct agency business outside the context of the public meeting.
  - *E-Government Act of 2002.*<sup>21</sup> This act requires agencies, to the extent practicable, to accept public comments on proposed rules by electronic means and to ensure that a publicly accessible Web site contains electronic dockets for their proposed rules.
  - *Paperwork Reduction Act.*<sup>22</sup> This act seeks to minimize the paperwork burden imposed by government on the public and requires an agency to seek clearance from the Office of Management and Budget if it proposes to collect information from 10 or more people on a particular matter. For example, this requirement would apply to an agency’s proposed rule that might seek information from the public.

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## Ex parte and Nonpublic Information Rules

APA places no restriction on “off-the record” or “ex parte” communication between agency decision makers and other persons during informal rulemaking.<sup>23</sup> However, FCC has rules about such contacts to protect the fairness of its proceedings by providing an assurance that FCC decisions are not influenced by off-the-record communications between decision makers and others. The rules also give FCC the flexibility to obtain the information it needs for making decisions. Under its ex parte rules, FCC generally classifies its rulemaking proceedings as “permit-but-disclose,” meaning that outside parties are allowed to present information to FCC

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<sup>19</sup>5 U.S.C. § 552(b).

<sup>20</sup>The Communications Act specifies that FCC’s meetings are to be held at least monthly. 47 U.S.C. § 155(d).

<sup>21</sup>E-Government Act of 2002, Pub. L. No. 107-347, Section 206, 116 Stat. 2899, Dec. 17, 2002.

<sup>22</sup>44 U.S.C. §§ 3501-3520.

<sup>23</sup>APA does prohibit ex parte comments on formal rulemakings and adjudications. 5 U.S.C. § 557(d)(1).

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either in writing or in person, but are required to disclose such communications in the public record.<sup>24</sup> The rules require a person making an oral ex parte presentation that includes data or arguments not already reflected in that person's other filings to submit a disclosure to the record summarizing the new data and arguments.<sup>25</sup> The rules state that the summary should generally be "more than a one or two sentence description" and not just a listing of the subjects discussed.<sup>26</sup> When there is ambiguity about whether data or arguments are already in the public record, FCC encourages parties to briefly summarize the matters discussed at a meeting. FCC's ex parte rules also establish the Sunshine Period, which begins when FCC releases the Sunshine Agenda of items scheduled for a vote at a public meeting and ends when those items are released to the public after the vote or are removed from the agenda before the meeting. During the Sunshine Period, the public may not contact the agency to discuss any matters that appear on the Sunshine Agenda unless there is a specific exemption.<sup>27</sup> The Sunshine Period does not apply to items that are voted on by circulation.

FCC rules state that staff must not directly or indirectly disclose nonpublic information outside the agency without authorization by the chairman.<sup>28</sup> Nonpublic information includes the content of public meeting agenda items, except for as required to comply with the Sunshine Act, and actions or decisions made by the commission at closed meetings or by circulation prior to the public release of such information.<sup>29</sup>

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<sup>24</sup>47 CFR § 1.1206(a)(1).

<sup>25</sup>Parties are not required to give advance notice of ex parte communications to other parties.

<sup>26</sup>47 CFR § 1.1206(b)(2).

<sup>27</sup>For example, there is an exemption for other federal agencies, Members of Congress, or congressional staff under certain conditions. 47 CFR § 1.1203(a).

<sup>28</sup>Federal regulations define nonpublic information as information that an employee gains by reason of federal employment that has not been made available to the general public, including information that is confidential, is exempt from disclosure, or is not authorized to be made available to the public on request. It includes information that the employee knows, or reasonably should know, has not been made available to the general public. 5 CFR § 2635.703(b).

<sup>29</sup>47 CFR § 19.735-203(a).

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## FCC's Rulemaking Process Includes Multiple Steps with Opportunities for Public Participation

FCC's rulemaking process includes multiple steps as outlined by law with opportunities for the public to participate during each step. FCC initiates rulemaking in response to statutes, petitions for rulemaking, or its own initiative. Any person may petition FCC to amend or create new rules. After FCC releases an NPRM, it develops and analyzes the public record to support a rule, leading to a final rule for the commission to adopt. Anyone may participate in the development of the public record through electronic filings and meetings with FCC officials. The FCC chairman has the flexibility to decide what proposed and final rules the commission will consider for adoption. At the chairman's discretion, the commission may adopt final rules either at a monthly public meeting or by circulating written items to each commissioner. Stakeholders unsatisfied with an FCC rule may file a petition for reconsideration with the commission or seek federal judicial review.

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### Initiation

FCC initiates rulemaking in response to statutes, petitions for rulemaking, or its own initiative.<sup>30</sup> FCC may propose rules under its broad regulatory authority granted by the Communications Act or in response to a specific statutory requirement. Congress may also impose a time frame or conditions for rulemaking.<sup>31</sup> FCC may also propose rules in response to petitions for rulemaking filed by outside parties. FCC puts petitions for rulemaking out for public comment and, after reviewing any comments, may initiate rulemaking on the issue or deny the petition. FCC does not have to respond to a rulemaking petition within a set time frame, so a petition for rulemaking can remain open indefinitely.

When initiating a new rulemaking, FCC has the flexibility to organize the public record in the manner that it deems most appropriate. FCC may establish a new docket to house the rule's supporting documents or initiate the proceeding in an existing docket, particularly if the filings already in that docket would be germane to the new proceeding. As we have previously discussed, there were 240 significant/substantive rules in our database published in the *Federal Register* between 2002 and 2006.

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<sup>30</sup>Sometimes FCC may release a notice of inquiry to gather information on an issue without formally initiating rulemaking.

<sup>31</sup>For example, in the Telecommunications Act, Congress specified that within 1 month after the date of the act's enactment, the commission convene a Federal Joint Board on Universal Service, and that it initiate a single proceeding to implement the board's recommendation. This proceeding was to be completed within 15 months of the act's enactment. 47 U.S.C. § 254.

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Among these recent rules, 47 were initiated in response to a petition for rulemaking, 172 were initiated on FCC's own authority or in response to a specific legal requirement, and 21 were initiated for a combination of these reasons.<sup>32</sup>

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## Rule Development

The commission's release of an NPRM signals the beginning of a rulemaking; the NPRM may or may not contain the text of the proposed new or revised rules. The NPRM provides an opportunity for comment on the proposal and indicates the length of the comment and reply comment periods, which stakeholders can use to submit comments and reply to other comments. These periods begin once the NPRM is published in the *Federal Register*. The NPRM also indicates the ex parte rules for contact under the rulemaking, which are generally "permit-but-disclose." After FCC releases an NPRM, it begins developing and analyzing the public record to support a rule, leading to proposed final rules for the commission's adoption.

FCC provides multiple avenues for public participation during rule development, including opportunities to submit filings electronically and to meet with FCC officials. Outside parties provide FCC with written comments, reply comments, and other types of data to support their positions on a rulemaking. Outside parties are permitted to discuss rulemakings with FCC officials, including commissioners, at any time except during the Sunshine Period. FCC officials said they make every effort to meet with any outside party that requests a meeting. For these meetings, FCC rules require the outside party to submit an ex parte disclosure for each meeting, indicating what new data or arguments were presented during the meeting. This disclosure, like any other filing in the docket, becomes part of the public record available electronically to the public through FCC's Electronic Comment Filing System (ECFS), a searchable Web-based depository of rulemaking notices and filings. Each document filed as part of the public record is associated with one or more dockets. FCC provides guidance to the public on its Web site for how to use ECFS and file comments.

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<sup>32</sup>For example, a rulemaking initiated in 2002 to examine commercial use of the so-called "millimeter wave" spectrum was initiated in response to an internal FCC initiative, sections 7(a) and 303(g) of the Communications Act, and a petition for rulemaking from an outside party.

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FCC officials said that they do not usually conduct their own studies in support of rulemaking issues.<sup>33</sup> Instead, they rely mostly on external stakeholders to submit this information into the public record, and FCC staff analyze the information. In addition, stakeholders can critique each other's data that are in the public record. On more technical issues, FCC's Office of Engineering and Technology may conduct analyses for the public record, and information FCC routinely collects, such as data on broadband use, may be placed in a docket if it is relevant to a rulemaking. Also, while FCC officials said that they do not typically identify and reach out to parties to participate in rulemakings, they may contact a particular stakeholder and request additional information for the public record or use publicly available data, such as data from the U.S. Census, to augment the public record. For example, officials from the Wireline Competition Bureau told us they contact rulemaking participants if they need an additional level of detail in the public record to adequately support a rule. In some cases, FCC also holds field hearings, such as the current series of hearings on media ownership, to solicit comment for the public record on specific rulemaking issues.

Using information contained in the public record as support, bureau staff draft proposed final rules for the commission to vote on. FCC officials must consider all timely filed comments and reply comments when developing a rule and have the flexibility to also consider information from ex parte filings. FCC officials said that they consider all types of comments filed in ECFS to support rulemakings; however, they said that specific comments on contentious rulemaking issues are more helpful than general comments that express support or opposition to a rule. FCC officials told us that they may also consider comments from stakeholders with a vested interest in an issue more seriously than those from other parties. FCC's Office of General Counsel and Office of Managing Director provide rulemaking guidance to bureaus and review rules to determine whether the bureaus followed the steps required by various rulemaking laws. FCC uses an electronic system, known as the Electronic Management Tracking System to track rulemakings and manage associated staff workload.

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<sup>33</sup>In 2006, Members of Congress contacted FCC Chairman Kevin Martin after learning that FCC had, under a previous chairman, conducted studies related to media ownership but had not released them publicly. In response, FCC made the studies available on its Web site, and Chairman Martin told Congress he had asked the FCC Inspector General to investigate the matter of the availability of the draft reports. We are also currently conducting a review on the subject of media ownership issues, but not the issue of the availability of the draft reports.

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The chairman decides when the commission will vote on final rules and whether the vote will occur during a public meeting or by circulation, which involves electronically circulating written items to each of the commissioners for approval. According to FCC officials, while it is not possible to vote on every rulemaking at a public meeting, items that are controversial or have a broad impact on the industry are more likely to be voted on during a public meeting. Of the 240 recent rules, 101 were adopted on the day the commission held a public meeting, indicating they may have been voted on at the meeting, while the other 139 appear to have been adopted by circulation.<sup>34</sup>

Three weeks before the commission considers an item at a public meeting, the chairman's office releases to FCC officials the draft version of the proposed rules the commission expects to vote on at the public meeting. These drafts are internal, nonpublic documents. FCC officials told us they do not release information to the public about what items the commission is planning to vote on at public meetings or items being circulated by the commission for adoption. FCC's written rulemaking guidance states that such information is nonpublic and may not be disclosed in any format, including via paper, electronic, or oral means, unless the chairman authorizes its disclosure.

For items to be voted on during a public meeting, the Office of Managing Director releases the Sunshine Agenda no later than 1 week before the meeting. The agenda includes a list of items the commission intends to vote on at the meeting and notifies the public that it may not contact the commission about those items during the week before the vote, the period known as the Sunshine Period. Items voted on through circulation do not usually appear on the Sunshine Agenda and, therefore, are not subject to the contact prohibition. According to FCC officials, at the chairman's discretion, the commission could adopt items included on the Sunshine Agenda by circulation in advance of the public meeting. No more than two commissioners may meet to deliberate on rulemaking matters outside of an official public meeting, according to a requirement of the Sunshine Act. Some FCC commissioners have said that this requirement should be changed because it creates logistical complications and transfers the daily

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<sup>34</sup>FCC rules do not indicate whether rules were adopted at a public meeting or by circulation.

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discussion of rules down from the commissioners to their staff. We did not evaluate these claims.<sup>35</sup>

Once the commission adopts a rule, the originating bureau often makes technical corrections to it and may also make substantive changes. Each commissioner is given the final rule before it is released and can decide if the rule has undergone substantive changes. Any substantive changes are approved by the commissioners, and the rule goes through a final internal review before FCC releases the rule and submits it to the *Federal Register* for publication.<sup>36</sup> FCC may adopt and release some rules on the same day, while other rules may require months of revision because the commission may vote on a particular issue or policy position and not the precise wording of the rule. When this occurs, the final wording of the rule is approved by all commissioners before the order is released.

It is difficult to determine time frames for FCC rules because FCC tracks which dockets are open, and many rules are in dockets that have been open for a long time. These dockets may include other rules or may have remaining issues to address. For example, one docket that has been open since 1980 includes several NPRMs and rules. A recent rule in this docket, issued in 2006, was attached to a Further Notice of Proposed Rulemaking, and was published in the *Federal Register* as an “interim rule,” indicating the issue is ongoing even though FCC has released several rules in the docket. Documents that are both an NPRM and a rule can be difficult to find in FCC’s database because the database allows a document to have only one document-type label, even if the document serves multiple purposes. As a result, if a document is filed as a rule and it also includes an NPRM, when searching for NPRMs this document would not be found.

FCC may also develop rules on the basis of comments solicited from notices other than a docket’s first NPRM. For example, a 2005 rule from a docket that began in 1997 was supported by an analysis of comments solicited in 2000 and 2003. FCC officials told us that some dockets—particularly those that address complex issues—contain multiple rulemakings. Specifically, a docket may contain different NPRMs and rules that are issued at different times. Therefore, a rule may be made in a

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<sup>35</sup>See the Letter to Honorable Ted Stevens, Chairman, Senate Committee on Commerce, Science and Transportation from Chairman Michael Powell and Commissioner Michael Copps (Feb. 2, 2005).

<sup>36</sup>FCC refers to a final rule document it releases as a “report and order.”

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docket to address a long-standing issue, but relate specifically to an NPRM that was not released until years after the docket was established.<sup>37</sup> Consequently, some rules could be considered to have shorter time frames because they address issues primarily raised in subsequent NPRMs released in the same docket. FCC officials told us that they do not track the time it takes to complete a rulemaking and generally are not required by statute to complete rules within certain time frames.<sup>38</sup> The time it takes to complete rules may vary because of the unique nature of each rulemaking. Certain factors, such as the technical complexity of the issue being address and the priority of the rulemaking in comparison to other issues, can also affect rulemaking time frames. We also reviewed rulemaking at the Environmental Protection Agency and Federal Trade Commission, but we could not compare their time frames with FCC's because of differences in their rulemaking processes.

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## Reconsideration and Appeal

Stakeholders unsatisfied with an FCC rule may file a petition for reconsideration with the commission or petition for federal judicial review. Stakeholders are allowed 30 days after a rule is published in the *Federal Register* to file a petition for reconsideration, although FCC usually has no required time frame for acting on such a petition.<sup>39</sup> FCC officials said they give priority consideration to petitions identifying problems with the rules they should correct quickly.

Parties may also petition the U.S. Courts of Appeals for review of an FCC rule, typically after the commission has already considered the issue, such as after FCC has denied a party's reconsideration petition. An appeals court may uphold, vacate (hold unlawful or set aside), or remand an FCC rule (send it back to the agency for further consideration) entirely or in part, which may lead the commission to take additional action on the rulemaking, such as issuing a new version of the rule to address the court's concerns. Twenty-five of the 240 recent rules had published opinions from the U.S. Courts of Appeals resulting from challenges. According to these opinions, the court denied or dismissed the challenges to 19 rules, and 6 rules, either wholly or in part, were determined to be unlawful or sent

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<sup>37</sup> Analysis to determine the unique NPRM(s) on which each of the 240 rules was based was beyond the scope of this review.

<sup>38</sup> An exception to this is the Telecommunications Act, which did require FCC to complete rulemakings on certain issues within prescribed time frames.

<sup>39</sup> A petitioner may file a petition for writ of mandamus to compel FCC action.

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back to FCC for further consideration.<sup>40</sup> In addition, according to FCC data, challenges to 12 of the 240 recent rules were pending in the U.S. Courts of Appeals as of June 2007.

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## **FCC Generally Followed the Rulemaking Process for Selected Rules, but Unequal Access to Nonpublic Information May Give Some Stakeholders an Advantage**

FCC generally followed the rulemaking process in the four case studies we reviewed. Specifically, each rulemaking included an NPRM and a notice and comment period. In reviewing the docket for each case study, we found that most—but not all—ex parte filings complied with the ex parte rules, and there was no evidence that FCC violated its Sunshine Period rule. However, we found that multiple stakeholders—both those involved in our case studies and other stakeholders who often file comments in FCC rulemakings—often knew when proposed rules were scheduled for a vote well before FCC released the agenda to the public and before the Sunshine Period began. This advance information is not supposed to be released outside of FCC. Other stakeholders with whom we spoke told us that they cannot learn when rules are scheduled for a vote until the agenda is publicly available. At that time, FCC rules prohibit stakeholders from lobbying, or making presentations to, FCC. This unequal access to information could create an unfair advantage for FCC stakeholders who know when FCC is about to vote on a rulemaking and, therefore, would know when it is most effective to present their arguments to FCC officials.

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## **In the Rulemakings We Reviewed, FCC Generally Followed the Rulemaking Process**

We reviewed four case studies of rules that were released from 2002 through 2006. Each of these rules originated in a different bureau—Media, Wireless Telecommunications, or Wireline Competition—or in FCC’s Office of Engineering and Technology. These bureaus and office had the most rulemakings during the period of our analysis. Table 1 describes each of our case studies.

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<sup>40</sup>Of the 19 rules with published opinions where the court denied the challenge, 17 had been subject to petitions for review while 2 others were subject to petitions to stay the rules’ effective dates.

**Table 1: Overview of Completed FCC Rules Selected as Case Studies**

Case study characteristics	Bureau or office			
	Wireline Competition	Wireless Telecommunications	Media	Engineering and Technology
Issue	Incumbent Local Exchange Carrier unbundling - competitors' access to incumbent telephone service infrastructure.	Public safety interference - potential remedies for interference in the public safety communications band.	Cable boxes - development of retail market for set-top cable boxes.	Amateur radio service - allotment of radio frequencies for amateur radio.
Subject	Congress required FCC to foster competition in local telephone service by requiring incumbent telephone companies to provide competitors with access to telephone network elements. This 2003 rule was FCC's third attempt to meet this requirement.	Responding to increased harmful interference between cellular telephone services and public safety communications sharing the same band of frequencies, FCC adopted rules to reconfigure the band to reduce interference.	Congress required FCC to foster a retail market for the set-top boxes used to access cable television services. Finding that efforts by cable and electronics interests had not achieved this, FCC adopted rules to spur the market's development.	Responding to petitions for rulemaking from an association representing amateur radio service users, FCC adopted rules modifying the classification of certain amateur radio channels and providing some additional channels for this purpose.
Date of first NPRM in related docket	December 20, 2001	March 15, 2002	February 20, 1997	May 15, 2002
Date(s) of NPRM(s) directly related to case study rule	December 20, 2001	March 15, 2002	September 18, 2000, and April 25, 2003	May 15, 2002
Date case study rule was released	August 21, 2003	August 6, 2004	March 17, 2005	May 14, 2003
Court opinion	The Court of Appeals for the D.C. Circuit vacated and remanded the rule in part, resulting in FCC's issuing another order in February 2005.	The Court of Appeals for the D.C. Circuit denied a petition for review of this rule, deciding that FCC did not act in an arbitrary and capricious manner in reconfiguring the band.	The Court of Appeals for the D.C. Circuit denied a petition for review of this order, finding that the court was barred from considering the issue because the time frame during which parties could petition FCC for reconsideration had not passed. The court also found nothing unreasonable about FCC's decision.	No published opinions on this rule exist.

Source: GAO analysis of FCC and U.S. Courts of Appeals data.

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Among our four case studies, three rules were initiated by FCC in response to specific statutory requirements or on its own initiative, and one rule—amateur radio service—was initiated in response to petitions for rulemaking. Each of our case studies began with an NPRM, which, among other things, included either the language of the proposed rule or a description of the subjects and issues involved. The NPRM also described the notice and comment period during which stakeholders could file comments that FCC must consider. One NPRM—amateur radio service— included a specific proposal for the rule, while the other NPRMs included only the subject of the rulemaking. For example, in the public safety interference rulemaking, the NPRM discussed various methods to minimize interference and asked for comments on these proposals. Some stakeholders told us that it is much easier to comment on an NPRM that includes a proposed rule. According to these stakeholders, it is easier to comment on a specific proposal instead of trying to comment on an entire subject or a range of proposals. However, there is no requirement that an NPRM include a proposed rule.

One NPRM that we reviewed contained an error, but that error did not appear to substantially affect the rulemaking. Specifically, the NPRM for the rulemaking on cable boxes incorrectly stated that the rulemaking was not bound by ex parte rules. FCC officials told us that this error occurred because language was inadvertently carried over from an earlier drafting of a notice of inquiry on cable boxes. FCC later decided to issue an NPRM instead of a notice of inquiry, but accidentally left in the language that the proceeding was not bound by ex parte rules. FCC officials told us that this mistake had no bearing on the rulemaking because stakeholders submitted ex parte filings anyway. Our review of the docket confirmed that stakeholders submitted ex parte filings in this rulemaking.

In each case study, numerous stakeholders participated in rule development, both during and after the comment period. Specifically, the case studies had between 42 comments (for the cable boxes rule) and 273 comments (for the public safety interference rule) filed during the comment period. In addition, FCC received between 8 (for the amateur radio service rule) and 2,237 (for the Incumbent Local Exchange Carrier (ILEC) unbundling rule) ex parte filings and comments in the docket after the formal comment period ended. These filings and comments, which were filed through FCC's Web site, either reflect a meeting between FCC officials and stakeholders or are written comments that stakeholders submitted after the formal comment period had ended. The comments range from lengthy studies to one-page, mass-produced e-mails. In formulating a rule, FCC must consider all comments that are filed during

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the comment period and may consider comments that are filed after the comment period. Each filed comment is placed in a docket that is publicly accessible through FCC's Web site. Generally, FCC does not produce its own studies to develop a rule. Rather, FCC relies on stakeholders to submit information and analysis that is then placed in the docket so that FCC and other stakeholders can critique the information. According to FCC officials, this results in both transparency and quality information because each stakeholder has had an opportunity to review and comment on all of the information in the docket.

In addition to submitting comments, stakeholders often meet with FCC staff to discuss issues. Stakeholders involved in our studies told us that they were able to meet with FCC officials when they requested meetings. Other stakeholders with whom we spoke who were not involved in these case studies but regularly comment on FCC rulemakings also told us that they were able to meet with FCC officials. A few of these stakeholders told us that, while FCC officials were always willing to meet with them, they were sometimes unsure if FCC officials were currently focused on the rulemaking that was being discussed. FCC officials told us that they meet with stakeholders who request a meeting, even if the stakeholders have no new information to present.

We found that most of the hundreds of ex parte filings in the four case studies appeared to meet the requirements, but several did not appear to be sufficient. These filings, which publicly document when stakeholders meet with FCC officials, generally detailed who attended the meeting or what arguments were raised. However, in the cable boxes rulemaking, one filing did not reveal which organization was represented at the meeting or what was discussed. Another filing discussed new information that was supported by a research report, but the report was not included with the ex parte filing. If the information is not filed in the public record with the ex parte filing, then it cannot be used to support a rulemaking. Therefore, stakeholders have an incentive to file complete ex parte disclosures. We also found some ex parte comments in three of the four case studies that do not describe the discussion at the meeting, but refer to comments already in the docket. While such filings may comply with ex parte rules, the effect of this type of filing is mixed. Since the ex parte filing did not explain those positions, it may not be very helpful to other stakeholders because other stakeholders would have to go to the docket and look up the party's filed comments. Some stakeholders told us that there is nothing wrong with these kinds of ex parte filings. According to these stakeholders, they already know the other stakeholders and what their arguments are. As a result, these stakeholders are not concerned about the

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adequacy of ex parte filings. In contrast, a few stakeholders told us that they do not have the time or the resources to monitor each docket and, therefore, such ex parte filings are not helpful. FCC officials told us that, generally, bureau staff both remind stakeholders to submit ex parte filings and review them for accuracy. If a filing is not accurate or complete, the staff member asks the stakeholder to resubmit the filing. Stakeholders may file a complaint with FCC if they believe that other stakeholders have not provided complete ex parte filings. However, according to FCC officials, very few complaints have been filed.

We found that FCC followed its Sunshine Period rule that prohibits unauthorized contact with FCC. In reviewing dockets and meeting with stakeholders and FCC officials, we found no evidence of any prohibited contact during the Sunshine Period. According to FCC officials and numerous stakeholders, the rules are well known and stakeholders do not generally request meetings or submit comments during this time. FCC officials told us that, if stakeholders do try to contact FCC or submit comments during the Sunshine Period, then FCC takes steps to ensure that the comments are not seen by the FCC staff working on the rulemaking. In the ILEC unbundling rulemaking, we found that several stakeholders submitted comments to FCC during the Sunshine Period. We also found that those comments were prominently marked in FCC's ECFS as comments that were submitted during the Sunshine Period and were not to be viewed by FCC staff working on the rulemaking.

The ILEC unbundling case study took a number of months to be released after the commission voted to approve it. The rule was adopted at a public meeting in February 2003, but was not released until August 2003. According to FCC officials, this delay was necessary because the final order was approximately 800 pages and the actual wording of the order was not voted on during the public meeting. Rather, the meeting included votes on the policy positions and issues associated with the order but not on the actual language. After the rule was adopted by the commission, Wireline Competition Bureau staff worked with relevant offices to draft the precise wording of the order, and then there were multiple discussions, comments, and revisions as the order went through each commissioner's office and each substantive change was approved by the commissioners.

The rules in our four case studies took between 1.0 and 4.5 years to complete from the time the related NPRM was issued. Generally, however, stakeholders told us that they are not concerned about the time it takes to conduct a rulemaking. Stakeholders told us that, if they support a

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rulemaking, they would like it to be completed more quickly. However, these same stakeholders said they may oppose another rulemaking and would like that rulemaking to proceed slowly or not be completed at all. In contrast, another stakeholder told us that they always support quick rulemakings because the businesses they represent prefer a stable regulatory market, and ongoing rulemakings create uncertainty for some businesses and their investors.

Three of the four rulemakings we reviewed were challenged in court. Both the public safety interference and the cable boxes rules were upheld by the U.S. Court of Appeals for the D.C. Circuit.<sup>41</sup> In the ILEC unbundling rulemaking, the D.C. Circuit vacated and remanded the rule in part, which means that part of the rule was struck down, part of the rule was returned to FCC for reconsideration, and part of the rule was upheld.<sup>42</sup> In response to the court's ruling, in August 2004, FCC issued another rule and NPRM soliciting comment on alternatives that would be consistent with the court's ruling, as well as a rule implementing a 12-month plan to stabilize the telecommunications market while the new rules were being written.<sup>43</sup> Six months later, FCC issued a rule that the commission said was consistent with the court's guidance.<sup>44</sup> This rule was also challenged and upheld by the D.C. Circuit.<sup>45</sup>

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### Multiple Stakeholders May Have an Advantage Because They Are Given Nonpublic Information

Several stakeholders told us that they learn which items FCC is about to vote on even though that information is not supposed to be released outside of FCC. FCC circulates information internally approximately 3 weeks before a public meeting to inform FCC staff of what is scheduled to be voted on at the public meeting. FCC rules prohibit the disclosure of this information to anyone outside of FCC. Specifically, the information is considered nonpublic information and cannot be released by any FCC employee without authorization from the FCC chairman. FCC officials in the units responsible for the case study rules and FCC officials in the units

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<sup>41</sup>457 F.3d 1 (D.C. Cir. 2006). 460 F.3d 31 (D.C. Cir. 2006).

<sup>42</sup>359 F.3d (D.C. Cir. 2004).

<sup>43</sup>*Unbundled Access to Network Elements*, WC Docket No. 04-313, Order and Notice of Proposed Rulemaking (FCC 04-179), 19 FCC Rcd. 16783 (Released Aug. 20, 2004).

<sup>44</sup>*Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand (FCC 04-290), 20 FCC Rcd. 2533 (Released Feb. 4, 2005).

<sup>45</sup>450 F.3d 528 (D.C. Cir. 2006).

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that conducted most of the rulemakings between 2002 and 2006 all told us that this is nonpublic information, and that they do not release it outside of FCC.

However, nine stakeholders—both those involved in the case studies we reviewed and other stakeholders with whom we spoke who regularly participate in FCC rulemakings—told us that they hear this information from both FCC bureau staff and commissioner staff. One stakeholder—representing a large organization that is involved in numerous rulemakings—told us that FCC staff call them and tell them what items are scheduled for a vote.

In contrast, a number of other stakeholders told us that they do not learn this information and do not know which items are scheduled for a vote. These stakeholders, who generally represent consumer and public-interest groups, told us that they do not know when FCC is about to vote on a rulemaking or when it would be best to meet with FCC staff to make their arguments. In contrast, stakeholders who know which items have been scheduled for a vote know when to schedule a meeting with FCC commissioners and staff because they know when FCC is about to vote on a rulemaking.

FCC officials told us that, for stakeholders to successfully make their case before FCC, “timing is everything.” Specifically, if a stakeholder knows that a proposed rule has been scheduled for a vote and may be voted on in 3 weeks, that stakeholder can schedule a meeting with FCC officials before the rule is voted on. In contrast, a stakeholder who does not know that the rule is scheduled for a vote may not learn that the rule will be voted on until the agenda is announced 1 week before the public meeting. However, once the agenda has been announced, the Sunshine Period begins, and no one can lobby FCC officials about the proposed rule. As a result, the stakeholder who learns that a rule has been scheduled for a vote 3 weeks before the vote can have a distinct advantage over a stakeholder who learns about an upcoming vote through the public agenda. Our case study reviews and discussions with multiple stakeholders showed that some stakeholders know this nonpublic information and, as a result, these stakeholders may have an advantage in the rulemaking process.

Even though advance knowledge that a rule is scheduled for a vote is nonpublic information, it has been reported by news agencies in the past. Specifically, in the cable boxes rulemaking, an industry newspaper published a story stating that the proposed rule would likely be circulated

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among the commissioners for a vote within the next few weeks. The newspaper attributed this information to unnamed “FCC sources.”<sup>46</sup>

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## Several Factors May Contribute to Dockets and Rulemakings Remaining Open

The complexity and number of issues within a docket and the priority the commission places on an issue may all factor into how long dockets, and the rulemakings within these dockets, remain open. FCC tracks open dockets, which may contain one or more rulemakings. The commission determines which rulemakings are a priority and when to open and close a docket; therefore, the commission determines how a rulemaking and a docket progress. Specifically, a docket may remain open because it is broad and is intended to include multiple rulemakings or because the commission has not voted to close the docket even though the docket includes completed rulemakings. Some rulemakings may remain open because they involve complex, technical issues or because competing priorities can force FCC officials to work on one rulemaking as opposed to another.

As of December 2006, FCC had 133 open dockets on the *Unified Agenda*,<sup>47</sup> 99 of which originated from three bureaus—Media, Wireless Telecommunications, or Wireline Competition—and one office—Engineering and Technology.<sup>48</sup> These four units had the most dockets during the period of our analysis. These dockets remain open for a variety of reasons. According to FCC officials, rulemakings may be completed within a docket even if the docket remains open. As we have previously discussed, one docket that has remained open since 1980 includes a number of NPRMs and rulemakings that were issued.

We selected four open dockets as case studies, each of which originated in a different FCC unit and had been open for a different length of time. Table 2 provides an overview of these dockets.

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<sup>46</sup>Anne Veigle, *Communications Daily*, February 22, 2005, Cable Section.

<sup>47</sup>The *Unified Agenda* is a public document, published every 6 months, that lists regulations that the government is considering or reviewing. FCC is required to submit a regulatory agenda that becomes part of the *Unified Agenda*.

<sup>48</sup>Thirty-four of the 133 dockets were scattered among several offices that were outside the scope of this review. Of the 99 dockets, 1 began in 2006. As a result, we analyzed 98 dockets.

**Table 2: Overview of Open FCC Dockets Selected for Case Study**

Case study characteristics	Bureau or office			
	Wireline Competition	Wireless Telecommunications	Media	Engineering and Technology
Issue	Internet protocol (IP) services - examination of issues relating to services and applications making use of IP, including voice-over-IP services.	Airport terminal use (ATU) - revision of communication frequencies at airports.	Distributed transmission systems (DTS) - implementation of a new digital television technology.	Satellite coordination - coordinating between terrestrial fixed stations and orbiting satellites in three different bands.
Subject	Seeks comments on what FCC's role should be in regulating IP services.	Responds to a petition for rulemaking to remove any limitation on the output power requirements for ATU frequencies.	Examines issues related to the use of DTS and proposes rules for future DTS operation.	Responds to a petition for rulemaking to adopt a growth zone proposal for satellites and protect satellites from interference.
Date of first NPRM	March 10, 2004	October 10, 2002	November 4, 2005 <sup>a</sup>	December 15, 2003
Date(s) of other NPRM(s) in docket	June 3, 2005 June 27, 2006 April 2, 2007	Not applicable	Not applicable	Not applicable
Date rule(s) released	June 3, 2005 June 27, 2006 April 2, 2007 June 15, 2007	January 24, 2005	November 4, 2005 <sup>a</sup>	Not applicable

Source: GAO analysis of FCC documents.

<sup>a</sup>The rule was a clarification of an interim rule that was released in another docket.

According to FCC officials, there is no way to determine exactly why a docket or a rulemaking remains open. While the chairman sets the FCC's agenda, the commission decides when to open and close dockets and when action will be taken on specific rulemakings, so whether or not a docket and rulemaking remain open is ultimately a commission decision. However, certain factors may contribute to dockets and rulemakings remaining open, including the following:

- *Broad dockets.* Some dockets may remain open because FCC designed them to be broad with multiple rulemakings. For example, FCC officials involved in the Internet protocol services case study told us that this docket was created to encompass a variety of issues related to this topic. Specifically, the commission wanted to initiate a rulemaking that looked at a number of issues related to Internet protocol services and anticipated that the docket would be open for years and would include a broad NPRM followed by a number of rules. FCC has already completed four rules

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within this open docket, including rules related to 911 service and voice-over-Internet-protocol service.

- *Housekeeping.* Some dockets may remain open even though the issue(s) within the docket has been addressed by a rulemaking. For example, in the airport terminal use case study, the docket remains open even though the issue raised in the NPRM has been addressed with a rule. FCC officials told us that the commission must vote to formally close a docket, and the commission will generally wait until after stakeholders have had a chance to file a petition for reconsideration or challenge the rulemaking in court. As a result, dockets often remain open for a time after a rule has been issued. FCC officials also told us that an open docket is a “housekeeping” issue, and that there is no harm in having dockets remain open. Stakeholders generally agreed that having dockets remain open is not an issue.
- *Complex/Technical issues.* Within open dockets, some rulemakings may remain open for many years because they involve complex, technical issues. For example, the satellite coordination case study involves the technical properties of different types of satellites and involves worldwide coordination and complex decisions about a satellite’s potential interference with another satellite. FCC officials also told us that satellite issues take a long time to resolve in part because of the nature of satellites, which require a worldwide frequency, a number of different applications, and millions of dollars. In the distributed transmission systems (DTS) case study, FCC officials and stakeholders told us that the issue involves complex new technology. Specifically, DTS technology would allow broadcasters to place towers around urban areas to more easily transmit digital programming. Within the rulemaking, stakeholders have submitted items such as proposed geographic locations for siting the towers to implement DTS, proposed criteria for determining if the towers are interfering with other broadcasts, and procedures to allow for potential additional transmitters without interference with adjacent channels.
- *Competing priorities.* Some rulemakings may remain open because other rulemakings take precedence and the number of staff available to work on rulemakings is limited. For example, FCC officials told us that they worked on some rulemakings that are more important to the transition to digital television instead of the DTS rulemaking because Congress has set a deadline for the end of the digital television transition. FCC officials decided to focus their staff resources on more important rulemakings, especially since only a few companies have applied to use DTS since FCC adopted the interim DTS policy. All of the stakeholders involved in the

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DTS rulemaking with whom we spoke agreed with FCC officials and told us that other issues related to digital television are more important than establishing permanent DTS rules. FCC officials also told us that the issues in the DTS case study are similar to other rulemakings on the transition to digital television. Since the staff with expertise in digital television cannot work on every rulemaking, FCC officials have to prioritize the rulemakings on which they work. As a result, some rulemakings, such as DTS, remain open.

Stakeholders generally told us that they are not concerned about the number of open dockets. According to these stakeholders, an open docket is not important; what matters is whether the rulemaking has been addressed. However, as we have previously discussed, stakeholders also told us that their views on the length of the rulemaking process could change depending on whether or not they favor the proposed rule. Specifically, supporters of an issue generally prefer a quick rulemaking, while opponents are likely to favor a lengthy rulemaking process.

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## Conclusions

As a regulatory agency, FCC is routinely lobbied by stakeholders with a vested interest in the issues FCC regulates. It is critical that FCC maintain an environment in which all stakeholders have an equal opportunity to participate in the rulemaking process and that the process is perceived as fair and transparent. Situations where some, but not all, stakeholders know what FCC is considering for an upcoming vote undermine the fairness and transparency of the process and constitute a violation of FCC's rules. Since the success of lobbying for a particular issue can be highly dependent on whether an issue is being actively considered, FCC staff who disclose nonpublic information about when an issue will be considered could be providing an advantage to some stakeholders, allowing them to time their lobbying efforts to maximize their impact. As a result, FCC may not hear from all sides of the issue during an important part of the rulemaking process. This imbalance of information is not the intended result of the Communications Act, and it runs contrary to the principles of transparency and equal opportunity for participation established by law and to FCC's own rules that govern rulemaking.

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## Recommendation for Executive Action

To ensure a fair and transparent rulemaking process, we recommend that the Chairman of the Federal Communications Commission:

- Take steps to ensure equal access to information, particularly in regard to the disclosure of information about proposed rules that are scheduled to

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be considered by the commission, by developing and maintaining (1) procedures to ensure that nonpublic information will not be disclosed and (2) a series of actions that will occur if the information is disclosed, such as referral to the Inspector General and providing the information to all stakeholders.

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## Agency Comments

We provided FCC with a draft of this report for their review and comment. FCC had no comment on the draft report and took no position on our recommendation.

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As we agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution of it until 30 days from the date of this letter. At that time, we will send copies to the appropriate congressional committees and the Chairman of the Federal Communications Commission. We will also make copies available to others on request. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff have any questions, please contact me on (202) 512-2834 or at [goldsteinm@gao.gov](mailto:goldsteinm@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. See appendix II for a list of major contributors to this report.

Sincerely yours,



Mark L. Goldstein  
Director, Physical Infrastructure Issues

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# Appendix I: Scope and Methodology

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To describe the Federal Communications Commission's (FCC) rulemaking process, we reviewed agency documents available on FCC's Web site that describe its rulemaking process. We also reviewed FCC's internal rulemaking guidance documents and applicable laws, such as the Administrative Procedure Act of 1946 (APA) and the Communications Act of 1934. We interviewed FCC officials from the Offices of General Counsel, Managing Director, and Engineering and Technology and the Wireline Competition, Wireless Telecommunications, Media, and Public Safety and Homeland Security Bureaus to determine how FCC generally conducts rulemaking. Because we wanted to focus our review on FCC rulemaking as it applies to regulating telecommunications and media in the United States, we excluded rulemaking by FCC's International Bureau from the scope of this study. We also interviewed organizations that represent a number of industries regulated by FCC as well as public-interest organizations to determine how these organizations participate in FCC rulemaking. Table 3 is a list of the organizations we interviewed and the principal sectors they represent.

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**Table 3: Industry and Public Interest Groups Interviewed in Our Study**

<b>Name of organization</b>	<b>Principal sector(s) represented</b>
American Cable Association	Smaller cable television
Association for Maximum Service Television	Television broadcasting technology
Association of Public-Safety Communications Officials	Public safety
Cable Television Laboratories	Cable industry research and development
Comptel	Competitive telecommunications services
Consumer Electronics Association	Consumer electronics
Consumer Electronics Retailers Coalition	Electronics retailers
Consumer Federation of America	Consumers
Consumers Union	Consumers
CTIA – The Wireless Association	Cellular telephone, other wireless
Media Access Project	Public-interest media and telecommunications
National Association of Broadcasters	Television and radio broadcasters
National Cable and Telecommunications Association	Cable television
National Telecommunications Cooperative Association	Small, rural telephone
New America Foundation	Public-interest research

Name of organization	Principal sector(s) represented
Personal Communications Industry Association	Wireless infrastructure
Satellite Industry Association	Satellite
Skybridge <sup>a</sup>	Satellite company
United States Telecom Association	Telecommunications
Verizon	Telecommunications company
Vonage <sup>a</sup>	Internet-protocol telephone company

Source: GAO interviews.

<sup>a</sup>We met with counsel that had represented Skybridge and Vonage in rulemakings.

We also gathered and analyzed available data on FCC rulemaking orders published in the *Federal Register* between 2002 and 2006. While each rulemaking order may contain one or more rules, each order is generally referred to as a rule. Therefore, throughout the report, we referred to each rulemaking order as a rule. We used the GAO online rules database to identify FCC rules published in the *Federal Register* between January 1, 2002, and December 31, 2006, and compiled a list of those rules contained in the database as of February 1, 2007, which we refer to as “recent rules.” We compiled only those rules FCC had identified as “significant/substantive” and excluded rules labeled as “routine/info./other.” We then used the *Federal Register* to identify each rule’s FCC document number and the number of its associated docket.<sup>1</sup> With those numbers, we were able to use FCC’s Web-based document databases—the Electronic Comment Filing System and the Electronic Document Management System—to retrieve FCC rulemaking documents, such as Notices of Proposed Rulemaking (NPRM), reports and orders (R&O), and comments and ex parte filings from public participants. NPRMs and R&Os include the dates they were adopted and released. Using these sources, for each recent rule, we were generally able to determine the rule’s docket; the originating bureau; the dates the rule was

<sup>1</sup>FCC documents, such as reports and orders and Notices of Proposed Rulemaking, are coded using the following unique number scheme: “FCC YY-ZZZ,” where “YY” represents the year the document was adopted and “ZZZ” represents a unique number from that year, such as “FCC 03-105,” the report and order for the Amateur Radio Service rule. FCC dockets use a similar unique numbering scheme, as follows: “XX Docket No. YY-ZZZ,” where “XX” stands for the bureau the rule originated in, “YY” represents the calendar year the docket was established, and “ZZZ” represents a unique number from that year, such as “ET Docket No. 02-98,” the docket for the Amateur Radio Service proceeding, which indicates the docket is from the Office of Engineering and Technology and was established in 2002.

adopted, released, and published in the *Federal Register*; and the dates the first NPRM was released in the rule's associated docket. Although some dockets contain multiple NPRMs, we did not analyze each rule to attempt to determine which specific NPRM(s) the rule was associated with, as it was not always clearly stated in the rules and a content comparison between each rule and each NPRM could not have been completed within the time frame for this study. We analyzed these NPRMs to determine generally why FCC initiated rulemaking.

We reviewed selected U.S. Courts of Appeals opinions that addressed challenges to these rules. We identified appeals court opinions published between January 1, 2002, and June 1, 2007, using legal research databases, FCC's Web site, and the Web site for the U.S. Court of Appeals for the D.C. Circuit. Using citations in these cases, we identified which cases were related to the "recent rules" we have previously identified. We then gathered and analyzed the published opinions related to those recent rules and identified the court's decision in each case. We also obtained from FCC a list of ongoing court challenges to their rules.

To determine the extent to which FCC followed its rulemaking process, we selected for case study four rules that were completed between 2002 and 2006. Of the 240 rules FCC completed during that time, 190 rules originated in the Media, Wireless Telecommunications, or Wireline Competition Bureaus or in the Office of Engineering and Technology. We selected one rule from each of these units. We also based our selection of rules on why the rules were initiated, how long they took to complete, and whether they were challenged in court. For each rule, we reviewed and analyzed the rulemaking records and interviewed FCC officials and stakeholders involved in the rulemakings. We used information from these case studies to illustrate examples of FCC rulemaking; however, the findings in our case studies cannot be generalized to all FCC rulemakings. In addition to these case studies, we interviewed stakeholders who represented different sectors of the telecommunications field, including wireless providers, satellite providers, and public safety and consumer groups. We also interviewed FCC officials in each of the four units to obtain information on general experiences with the FCC rulemaking process.

To identify the factors that contributed to dockets and rulemakings remaining open, we reviewed FCC's list of dockets in the December 2006 *Federal Register's Unified Agenda of Federal Regulatory and Deregulatory Actions*. The *Unified Agenda* is published every 6 months and includes a list of dockets that FCC considers to be open. As of

December 2006, FCC had 133 open dockets, 99 of which originated from 3 bureaus—Media, Wireless Telecommunications, or Wireline Competition—or FCC’s Office of Engineering and Technology. Of these 99 open dockets, 1 began in 2006—making it too recent to include in our analysis. As a result, we analyzed 98 dockets. From those 98 dockets, we selected 4 dockets for case study. We selected dockets that originated in different FCC bureaus or offices, were initiated for different reasons, and had been open for various lengths of time. Each docket may contain one or more rulemakings, and we analyzed each docket and the rulemakings within each docket. We reviewed and analyzed the rulemaking records and interviewed FCC officials and stakeholders involved in the rulemakings to determine why the dockets and rulemakings remained open. We used information from these case studies to illustrate examples of FCC rulemaking; however, the findings in our case studies cannot be generalized to all FCC rulemakings.

We determined that the data used in this report were sufficiently reliable for the purposes of our review. We conducted our review from October 2006 through July 2007 in accordance with generally accepted government auditing standards.

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# Appendix II: GAO Contact and Staff Acknowledgments

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## GAO Contact

Mark L. Goldstein (202) 512-2834

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## Staff Acknowledgments

In addition to the contact named above, individuals making key contributions to this report include Tim Bober, Lauren Calhoun, Maria Edelstein, Bess Eisenstadt, Edda Emmanuelli-Perez, Andrew Huddleston, Sara Ann Moessbauer, Josh Ormond, John W. Shumann, Tristan T. To, and Mindi Weisenbloom.

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