

December 2009

# FCC MANAGEMENT

## Improvements Needed in Communication, Decision-Making Processes, and Workforce Planning





Highlights of [GAO-10-79](#), a report to congressional requesters

## Why GAO Did This Study

Rapid changes in the telecommunications industry, such as the development of broadband technologies, present new regulatory challenges for the Federal Communications Commission (FCC). GAO was asked to determine (1) the extent to which FCC's bureau structure presents challenges for the agency in adapting to an evolving marketplace; (2) the extent to which FCC's decision-making processes present challenges for FCC, and what opportunities, if any, exist for improvement; and (3) the extent to which FCC's personnel management and workforce planning efforts face challenges in ensuring that FCC has the workforce needed to achieve its mission. GAO reviewed FCC documents and data and conducted literature searches to identify proposed reforms, criteria, and internal control standards and compared them with FCC's practices. GAO also interviewed current and former FCC chairmen and commissioners, industry stakeholders, academic experts, and consumer representatives.

## What GAO Recommends

GAO recommends FCC, among other things, develop written policies on interbureau coordination and commissioner access to staff analyses; revise its public comment process and its *ex parte* policies; and develop targets identifying expertise needs, strategies for meeting targets, and measures for tracking progress. FCC generally concurred with GAO's recommendations.

View [GAO-10-79](#) or key components. For more information, contact Mark L. Goldstein at (202) 512-2834 or [goldsteinm@gao.gov](mailto:goldsteinm@gao.gov).

## FCC MANAGEMENT

### Improvements Needed in Communication, Decision-Making Processes, and Workforce Planning

#### What GAO Found

FCC consists of seven bureaus, with some structured along functional lines, such as enforcement, and some structured along technological lines, such as wireless telecommunications and media. Although there have been changes in FCC's bureau structure, developments in the telecommunications industry continue to create issues that span the jurisdiction of several bureaus. However, FCC lacks written procedures for ensuring that interbureau collaboration and communication occurs. FCC's reliance on informal coordination has created confusion among the bureaus regarding who is responsible for handling certain issues. In addition, the lack of written procedures has allowed various chairmen to determine the extent to which interbureau collaboration and communication occurs. This has led to instances in which FCC's final analyses lacked input from all relevant staff. Although FCC stated that it relies on its functional offices, such as its engineering and strategic planning offices, to address crosscutting issues, stakeholders have expressed concerns regarding the chairman's ability to influence these offices.

Weaknesses in FCC's processes for collecting and using information also raise concerns regarding the transparency and informed nature of FCC's decision-making process. FCC has five commissioners, one of which is designated chairman. FCC lacks internal policies regarding commissioner access to staff analyses during the decision-making process, and some chairmen have restricted this access. Such restrictions may undermine the group decision-making process and impact the quality of FCC's decisions. In addition, GAO identified weaknesses in FCC's processes for collecting public input on proposed rules. Specifically, FCC rarely includes the text of a proposed rule when issuing a Notice of Proposed Rulemaking to collect public comment on a rule change, although some studies have noted that providing proposed rule text helps focus public input. Additionally, FCC has developed rules regarding contacts between external parties and FCC officials (known as *ex parte* contacts) that require the external party to provide FCC a summary of the new information presented for inclusion in the public record. However, several stakeholders told us that FCC's *ex parte* process allows vague *ex parte* summaries and that in some cases, *ex parte* contacts can occur just before a commission vote, which can limit stakeholders' ability to determine what information was provided and to rebut or discuss that information.

FCC faces challenges in ensuring it has the expertise needed to adapt to a changing marketplace. For example, a large percentage of FCC's economists and engineers are eligible to retire in 2011, and FCC faces difficulty recruiting top candidates. FCC has initiated recruitment and development programs and has begun evaluating its workforce needs. GAO previously noted that strategic workforce planning should include identifying needs, developing strategies to address these needs, and tracking progress. However, FCC's Strategic Human Capital Plan does not establish targets for its expertise needs, making it difficult to assess the agency's progress in addressing its needs.

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# Contents

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<b>Letter</b>		<b>1</b>
	Background	3
	FCC's Current Structure and Informal Coordination Processes Can Limit FCC's Ability to Efficiently Address Crosscutting Issues	11
	Weaknesses in FCC's Processes for Collecting and Using Information Can Undermine the Transparency and Effectiveness of the Decision-Making Process	23
	FCC Faces a Number of Workforce Challenges but Does Not Track the Progress of Its Efforts to Address Those Challenges	38
	Conclusions	45
	Recommendations for Executive Action	47
	Agency Comments	48

---

<b>Appendix I</b>	<b>Objectives, Scope, and Methodology</b>	<b>51</b>
-------------------	---	-----------

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<b>Appendix II</b>	<b>FCC Bureaus and Functions</b>	<b>54</b>
--------------------	----------------------------------	-----------

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<b>Appendix III</b>	<b>Comments from the Federal Communications Commission</b>	<b>58</b>
---------------------	--	-----------

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<b>Appendix IV</b>	<b>GAO Contact and Staff Acknowledgments</b>	<b>63</b>
--------------------	--	-----------

---

<b>Tables</b>		
	Table 1: Projected 2011 Retirement Eligibility for FCC Engineers and Economists	40
	Table 2: Comparison of FCC Responses and Responses from the Rest of the Government on Selected Items from the 2008 OPM Federal Human Capital Survey	42
	Table 3: Organizations Interviewed	53

---

<b>Figures</b>		
	Figure 1: FCC's Rulemaking Process	10
	Figure 2: FCC Organization Chart and Timeline of Changes	13

---

Figure 3: Changes in the Number of Economists, Engineers, and  
Other Staff Employed at FCC

39

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**Abbreviations**

APA	Administrative Procedures Act
Communications Act	Communications Act of 1934
CGB	Consumer and Governmental Affairs Bureau
DOJ	Department of Justice
DSL	Digital Subscriber Line
FCC	Federal Communications Commission
FHCS	Federal Human Capital Survey
FNPRM	Further Notice of Proposed Rulemaking
NOI	Notice of Inquiry
NPRM	Notice of Proposed Rulemaking
NRC	Nuclear Regulatory Commission
OET	Office of Engineering and Technology
OPM	Office of Personnel Management
OSP	Office of Strategic Planning and Policy Analysis
SBA	Small Business Administration
Sunshine Act	Government in the Sunshine Act of 1976
Telecommunications Act	Telecommunications Act of 1996

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United States Government Accountability Office  
Washington, DC 20548

December 17, 2009

The Honorable Rick Boucher  
Chairman  
Subcommittee on Communications, Technology, and the Internet  
House of Representatives

The Honorable Edward J. Markey  
House of Representatives

Federal Communications Commission (FCC) regulations affect the daily lives of every American, from rules governing who may own the morning newspaper to the networks connecting the last phone call at night. FCC-regulated industries provide Americans with daily access to communications services, including wireline and wireless telephone service, Internet access services, and radio and video services. FCC's regulatory authority was substantially amended by the Telecommunications Act of 1996 (Telecommunications Act), with a goal of fostering competition among companies that used similar technology to provide services. However, the act did not fully envision the competition that has subsequently developed among previously distinct industries, such as wireless service competing with both local and long-distance wireline service, and video and telephone service providers competing to offer "bundles" of phone, video, and Internet services. As a result, some have argued that FCC's current statutory framework applies different regulations to competing industries and has become inconsistent with current market conditions. FCC has acknowledged that its ability to respond to the evolving marketplace depends upon effective and transparent communication among FCC staff and with the members of the public, as well as the assurance that the agency has the information and expertise needed to adapt to evolving conditions. However, the agency has faced a series of critiques regarding the interaction among the chairman, commissioners, and bureau staff; transparency in its decision making; and workforce and personnel issues. To address these issues, a number of reforms have been proposed. In June 2009, Chairman Genachowski appointed a special counsel for FCC reform and directed FCC's general counsel and managing director to perform a thorough review of the existing processes and to make recommendations for improvement. As part of this process, FCC has launched an internal online forum where employees can submit ideas for improvement and reform, and FCC is planning on launching a section on FCC's Web site that will allow the public to offer ideas for FCC reform as well.

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Seeking information about FCC's ability to achieve its mission, you asked us to review FCC's organization, decision-making process, and personnel management. Accordingly, this report examines (1) the extent to which FCC's bureau structure presents challenges for the agency in adapting to an evolving marketplace; (2) the extent to which FCC's decision-making processes present challenges for FCC, and what opportunities, if any, exist for improvement; and (3) the extent to which FCC's personnel management and workforce planning efforts ensure that FCC has the workforce needed to achieve its mission.

To describe the challenges FCC's bureau structure presents the agency in adapting to an evolving marketplace, we reviewed FCC procedures, applicable laws, and reviewed academic literature on organizational theory. To identify the extent to which FCC's decision-making processes present challenges for FCC and opportunities for improvement, we reviewed literature on potential reforms to the federal rulemaking process and on the commission structure and decision-making process. We interviewed officials from the Nuclear Regulatory Commission, Federal Energy Regulatory Commission, and the Federal Trade Commission and reviewed their internal commission procedures to understand how other independent regulatory agencies implement the commission decision-making process. We reviewed FCC's decision-making procedures and public comment and *ex parte* rules, and compared certain aspects to standards established in our internal control standards and other relevant documents. To determine the extent to which FCC's personnel management and workforce planning efforts ensure that FCC has the workforce needed to achieve its mission, we reviewed our prior products related to strategic workforce planning and human capital challenges, and reviewed FCC's 2007-2011 Strategic Human Capital Plan and FCC-generated data on overall staff levels, hiring, attrition, and retirement eligibility for the period of 2003 to 2008. We analyzed results from the Office of Personnel Management's (OPM) Federal Human Capital Survey (FHCS) for 2008 and compared FCC responses on various items with the results for the rest of government. We determined that the staffing data provided by FCC and the FCC 2008 FHCS survey data are sufficiently reliable for the purposes of this report. In addition, to address all of these questions, we interviewed current and former FCC officials, including commissioners and chairmen, as well as industry, consumer, and academic stakeholders.

We performed our review from August 2008 to October 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate

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evidence to provide a reasonable basis for our findings and conclusions based on our review objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our review objectives. A detailed discussion of our scope and methodology appears in appendix I.

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## Background

FCC was established by the Communications Act of 1934 (Communications Act). The Communications Act, as amended, specifies that FCC was established for the “the purpose of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense [and] for the purpose of promoting safety of life and property through the use of wire and radio communication.”<sup>1</sup> FCC is responsible for, among other things, making available rapid, efficient, nationwide, and worldwide wire and radio communication services at reasonable charges and on a nondiscriminatory basis, and more recently, promoting competition and reducing regulation of the telecommunications industry in order to secure lower prices and high-quality services for consumers.<sup>2</sup> FCC established six strategic goals to support its mission:<sup>3</sup>

1. Promote access to robust and reliable broadband products and services<sup>4</sup> for all Americans.
2. Promote a competitive framework for communications services that support the nation’s economy.

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<sup>1</sup>47 U.S.C. § 151.

<sup>2</sup>The Telecommunications Act, which substantially amended the Communications Act, effected comprehensive reform of the nation’s telecommunications statutory and legal framework. Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>3</sup>Federal Communications Commission, *Strategic Plan 2009-2014* (Washington, D.C.).

<sup>4</sup>The term “broadband” refers to advanced communications systems capable of providing high-speed transmission of services such as data, voice, and video over the Internet and other networks. Transmission is provided by a wide range of technologies, including digital subscriber line and fiber optic cable, coaxial cable, wireless technology, and satellite. Broadband platforms make possible the convergence of voice, video, and data services onto a single network.

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3. Facilitate efficient and effective use of nonfederal spectrum<sup>5</sup> to promote growth and rapid development of innovative and efficient communications technologies and services.
  4. Develop media regulations that promote competition, diversity, and localism and facilitate the transition to digital modes of delivery.
  5. Promote access to effective communications during emergencies and crises and strengthen measures for protecting the nation's critical communications infrastructure.
  6. Strive to be a highly productive, adaptive, and innovative organization that maximizes the benefit to stakeholders, staff, and management from effective systems, processes, resources, and organizational culture.

FCC's basic structure is prescribed by statute. FCC is composed of five commissioners, appointed by the President and approved by the Senate to serve 5-year terms; the President designates one member to serve as chairman. No more than three commissioners may come from any one political party.<sup>6</sup> The commission has flexibility in how it creates and organizes divisions or bureaus responsible for specific work assigned. Specifically, the Communications Act, as amended, requires the commission to organize its staff into (1) integrated bureaus, to function on the basis of the commission's principal workload operations, and (2) such other divisional organizations as the commission deems necessary.<sup>7</sup> FCC currently consists of seven bureaus that are responsible for a variety of issues that affect consumers and the telecommunications industry, including analyzing complaints, licensing, and spectrum auctions, and 10 offices that provide support services for the bureaus and commission. Appendix II has a detailed description of each bureau and office. Each bureau is required by statute to include the legal, engineering, accounting, administrative, clerical, and other personnel that the commission

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<sup>5</sup>Spectrum encompasses the entire range of electromagnetic radio frequencies used in the transmission of sound, data, and video. FCC is responsible for spectrum not used by the federal government, including spectrum used by individuals (e.g., garage door openers and computer modems), private organizations (e.g., radio and television broadcasters), and public safety and health officials (e.g., police and emergency medical technicians).

<sup>6</sup>47 U.S.C. § 154.

<sup>7</sup>47 U.S.C. § 155(b).



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determines necessary to perform its functions.<sup>8</sup> FCC has identified attorneys, engineers, and economists as the agency's main professional categories. Although FCC has staff offices with concentrations of each profession (attorneys in the Office of General Counsel, engineers in the Office of Engineering and Technology, and economists in the Office of Strategic Planning and Policy Analysis), these professions are also integrated into the bureaus.

Under the Communications Act, as amended, FCC has broad authority to execute its functions. The act, as amended, is divided into titles and sections that describe various powers and concerns of the commission, with different titles describing the laws applicable to different services. For example, there are separate titles outlining the specific provisions for telecommunications services and for cable services. This statutory structure created distinct regulatory "silos" that equated specific services with specific network technologies. However, technological advances in communications infrastructure have led to a convergence of previously separate networks used to transmit voice, data, and video communications. For example, telephone, cable, and wireless companies are increasingly offering voice, data, and video services over a single platform.

FCC is charged with carrying out various activities, including issuing licenses for broadcast television and radio; overseeing licensing, enforcement, and regulatory functions of cellular phones and other personal communication services; regulating the use of radio spectrum and conducting auctions of licenses for spectrum; investigating complaints and taking enforcement actions if it finds that there have been violations of the various communications laws and commission rules that are designed to protect consumers; addressing public safety, homeland security, emergency management, and preparedness; educating and informing consumers about communications goods and services; and reviewing mergers of companies holding FCC-issued licenses. The Telecommunications Act also expanded FCC's responsibilities for universal service beyond the traditional provision of affordable,

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<sup>8</sup>*Id.*

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nationwide access to basic telephone service to include eligible schools, libraries, and rural health care providers.<sup>9</sup>

Two major laws that affect FCC's decision-making process are the Government in the Sunshine Act of 1976 (Sunshine Act) and the Administrative Procedure Act of 1946.<sup>10</sup>

- *Government in the Sunshine Act of 1976:*<sup>11</sup> The Sunshine Act applies to agencies headed by collegial bodies. Under the Sunshine Act, FCC is required to provide sufficient public notice that the meeting of commissioners will take place.<sup>12</sup> The agency generally must also release the meeting's agenda, known as the Sunshine Agenda, no later than 1 week before the meeting. In addition, the Sunshine Act prohibits more than two

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<sup>9</sup>The commission has established four universal service programs. The high-cost program assists customers living in high-cost, rural, or remote areas through financial support to telephone companies. The schools and libraries program (commonly referred to as E-rate) assists eligible schools and libraries in procuring telecommunications and Internet services. The low-income program assists qualifying low-income customers through discounted installation and monthly telephone services and free toll limitation service. Rural health care assists health care providers located in rural areas through discounts for telecommunications and Internet access services. These programs are funded by the Universal Service Fund. Telecommunications carriers and certain other telecommunications providers must contribute to the fund based on a percentage of their interstate and international revenues. The Universal Service Administrative Company, or USAC, administers the daily operations of the federal Universal Service Programs on behalf of FCC. This report does not address FCC's management of this program.

<sup>10</sup>Other laws and orders also apply to FCC rulemakings, including but not limited to the Regulatory Flexibility Act, the Congressional Review Act, the E-Government Act of 2002, and the Paperwork Reduction Act.

<sup>11</sup>5 U.S.C. § 552b. The term "agency," for purposes of the Sunshine Act, means "any agency...headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C. § 552b(a)(1).

<sup>12</sup>The Communications Act specifies that FCC's meetings are to be held at least monthly. 47 U.S.C. § 155(d).

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of the five<sup>13</sup> FCC commissioners from deliberating with one another to conduct agency business outside the context of the public meeting.<sup>14</sup>

- *Administrative Procedure Act of 1946*:<sup>15</sup> The Administrative Procedure Act (APA) is the principal law governing how agencies make rules. The law prescribes uniform standards for rulemaking, requires agencies to inform the public about their rules and proposed changes, and provides opportunities for public participation in the rulemaking process. Most federal rules are promulgated using the APA-established informal rulemaking process, which requires agencies to provide public notice of proposed rule changes, as well as provide a period for interested parties to comment on the notices—hence the “notice and comment” label. The notice and comment procedures of the APA are intended to encourage public participation in the administrative process, to help educate the agency, and thus, to produce more informed agency decision making. Experts have noted that public participation promotes legitimacy by creating a sense of fairness in rulemaking, and transparency helps both the public and other branches of government to assess whether agency decisions are in fact being made on the grounds asserted for them and not on other, potentially improper, grounds. APA does not generally address time frames for informal rulemaking actions, limits on contacts between agency officials and stakeholders, or requirements for “closing” dockets.

FCC implements its policy initiatives through a process known as rulemaking, which is the governmentwide process for creating rules or regulations that implement, interpret, or prescribe law or policy.<sup>16</sup> When developing, modifying, or deleting a rule, FCC relies on public input provided during the rulemaking process.

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<sup>13</sup>In addition, the Sunshine Act allows two of the five commissioners to deliberate with one another outside the context of a public meeting, even if there are fewer than five commissioners serving in office, since two commissioners do not constitute a quorum and cannot take action on behalf of the agency. A recently introduced bill would authorize three or more FCC commissioners to hold nonpublic collaborative discussions. See *Federal Communications Commission Collaboration Act*, H.R. 4167, 111th Cong. (2009).

<sup>14</sup>Such meetings may be closed, in whole or in part, to the public under certain circumstances—for example, if the meetings relate to issues such as national defense, trade secrets, criminal investigations, and personal information. 5 U.S.C. § 552b(c).

<sup>15</sup>5 U.S.C. § 551 *et seq.*

<sup>16</sup>5 U.S.C. § 551(4) & (5).

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Before beginning the rulemaking process, FCC may issue an optional Notice of Inquiry (NOI) to gather facts and information on a particular subject or issue to determine if further action by the FCC is warranted.<sup>17</sup> Typically, an NOI asks questions about a given topic and seeks comments from stakeholders on that topic. If FCC issues an NOI, it must issue a Notice of Proposed Rulemaking (NPRM) before taking final action on a rule, unless an exception to notice and comment rulemaking requirements applies. FCC issues NPRMs to propose new rules or to change existing rules, and the issuance of an NPRM signals the beginning of the rulemaking process.<sup>18</sup> The NPRM provides an opportunity for the stakeholders to submit their comments on the proposal and to reply to the comments submitted by other stakeholders.<sup>19</sup> A summary of the NPRM is published in the *Federal Register* and announces the deadlines for filing public comments and reply comments. The NPRM also indicates the rules for *ex parte* communications between agency decision makers and other persons during the proceeding. An *ex parte* presentation discusses the merits or outcome of a proceeding, and if written, is not served on all the parties to a proceeding, and if it is oral, it is made without advance notice to the parties or an opportunity for them to be present.<sup>20</sup> FCC generally classifies its rulemaking proceedings as “permit-but-disclose” proceedings, in which *ex parte* presentations to FCC officials are permissible but subject to certain disclosure requirements.<sup>21</sup> Generally, the external party must provide two copies of written presentations to be filed in the public record. If an external party makes an oral *ex parte* presentation that presents data or arguments not already reflected in the party’s written comments or other filings in that proceeding, then the external party must provide FCC’s Secretary with an original and one copy of a summary of the new data or arguments to be filed in the public record.<sup>22</sup> Once FCC

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<sup>17</sup>FCC is not required to issue an NOI before issuing a Notice of Proposed Rulemaking, and as discussed later in the report, often does not. *See* 47 C.F.R. § 1.430.

<sup>18</sup>47 C.F.R. § 1.412.

<sup>19</sup>47 C.F.R. § 1.415.

<sup>20</sup>47 C.F.R. § 1.1202.

<sup>21</sup>47 C.F.R. § 1.1206(a)(1).

<sup>22</sup>47 C.F.R. § 1.1206(b). In permit-but-disclose proceedings, *ex parte* presentations by members of Congress or their staffs and other federal agencies or their staffs need be disclosed only if they are of substantial significance and clearly intended to affect the ultimate decision in the proceeding. Disclosure of *ex parte* presentations by members of Congress or their staffs and other federal agencies or their staffs will generally be made by the commission’s staff.

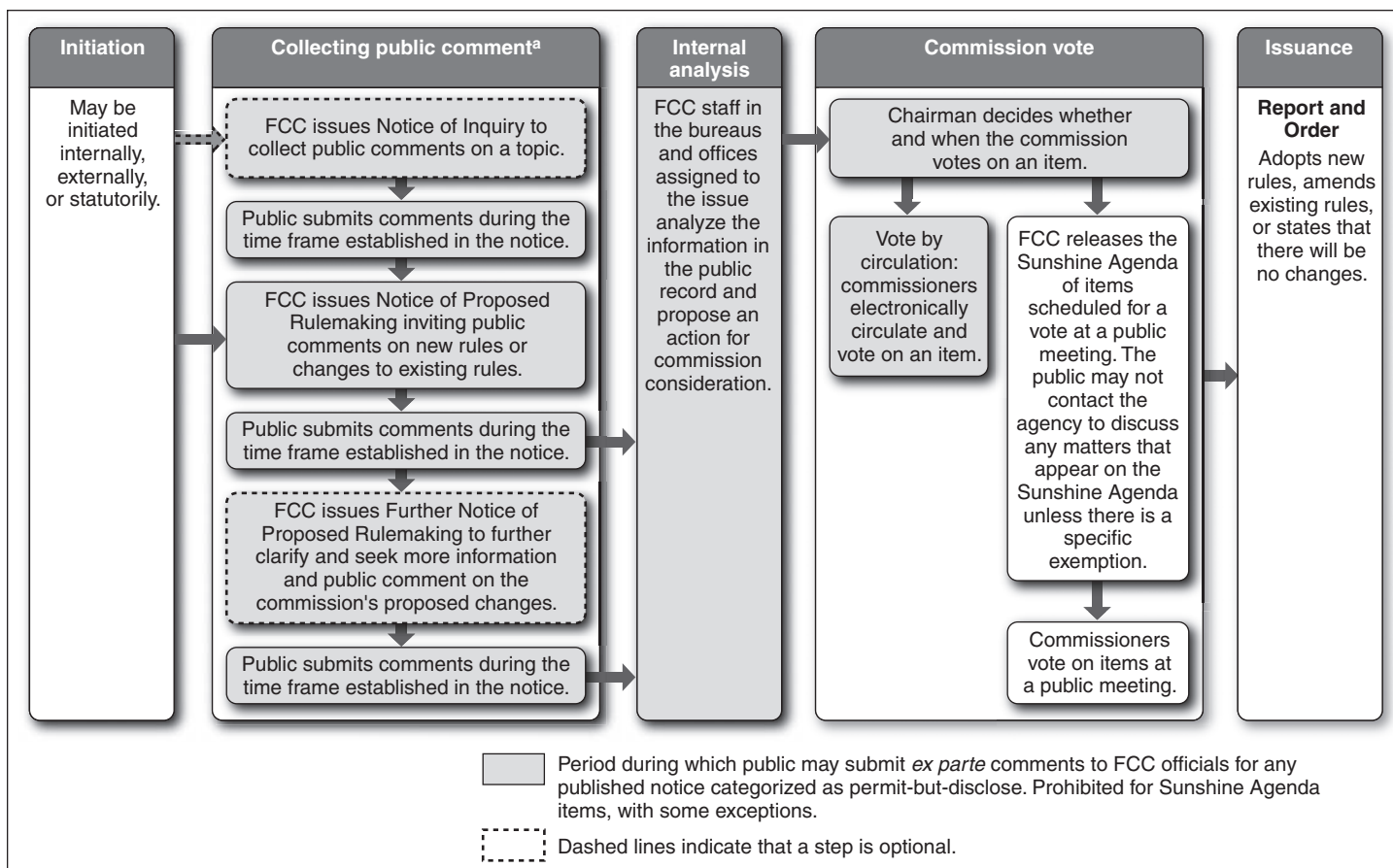
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places an item on the Sunshine Agenda, which lists the items up for a vote at the next open commission meeting, *ex parte* contacts are restricted, with several exemptions.<sup>23</sup> In addition, FCC provides the stakeholders the ability to submit electronic comments via the FCC Web site. After reviewing the comments received in response to an NPRM, the FCC may issue a Further Notice of Proposed Rulemaking (FNPRM) seeking additional public comment on specific issues in the proceeding. Following the close of the reply and comment period, FCC officials may continue discussing the issue with external parties through *ex parte* presentations. Staff in the bureaus assigned to work on the order begin developing and analyzing the public record and the information provided in *ex parte* contacts to propose an action for the commission to vote on, such as adopting final rules, amending existing rules, or stating that there will be no changes. 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. See figure 1 for an illustration of the steps in FCC's rulemaking process.

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<sup>23</sup> 47 C.F.R. § 1.1203.

**Figure 1: FCC's Rulemaking Process**



Source: GAO analysis of FCC information.

<sup>a</sup>This graphic focuses on the process for collecting public comments for APA notice and comment rulemaking proceedings. FCC may collect public comment through other means (such as soliciting comments on a petition for rulemaking through a Public Notice during the initiation phase). A person outside of the FCC may file a Petition for Rulemaking to suggest new rules or changes to existing rules. Unless directed in the FCC's Public Notice seeking comment on the petition, the public has 30 days from the date of the Public Notice to submit comments on whether the FCC should grant or deny the petition. After reviewing the comments received in response to the petition, the FCC issues an order disposing of the petition, an NOI, or an NPRM.

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## FCC's Current Structure and Informal Coordination Processes Can Limit FCC's Ability to Efficiently Address Crosscutting Issues

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### Despite Changes to Modernize FCC's Bureau Structure, Market and Technological Changes Have Created Issues That Span FCC's Bureaus

Although FCC has established some function-based bureaus and reorganized its bureaus to reflect some changes in the telecommunications market, further evolutions and the growth of new technologies have continued to create crosscutting issues that span several bureaus. FCC's bureaus are still somewhat structured along the traditional technology lines of wireless, wireline, satellite, and media, despite the fact that one company may provide services that span such distinctions or that competing services may be regulated by different bureaus. Since the Telecommunications Act, chairmen have made changes to FCC's bureau structure. In 1999 Chairman Kennard<sup>24</sup> issued *A New FCC for the 21<sup>st</sup> Century*, which called for reorganizing FCC's bureau structure along functional, rather than technological, lines in order to carry out FCC's core responsibilities more productively and efficiently. Subsequently, FCC consolidated enforcement functions and personnel from the Common Carrier, Mass Media, Wireless Telecommunications, and Compliance and Information Bureaus into a new Enforcement Bureau. In addition, FCC consolidated consumer complaint and public information functions of the various bureaus into a Consumer Information Bureau.

Chairman Powell<sup>25</sup> also issued a reorganization plan to promote a more efficient, responsive, and effective organizational structure. This reform and reorganization plan included creating three new bureaus and one new office. FCC consolidated the Mass Media Bureau and Cable Services Bureau into a new overarching Media Bureau, and restructured the Common Carrier Bureau and renamed it the Wireline Competition Bureau.

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<sup>24</sup>FCC Chairman, October 1997 to January 2001.

<sup>25</sup>FCC Chairman, January 2001 to March 2005; FCC Commissioner, November 1997 to March 2005.

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Additionally, the Consumer Information Bureau was given increased policy making and intergovernmental affairs responsibilities and was renamed the Consumer and Governmental Affairs Bureau. Finally, the Office of Strategic Planning and Policy Analysis subsumed the Office of Plans and Policy.

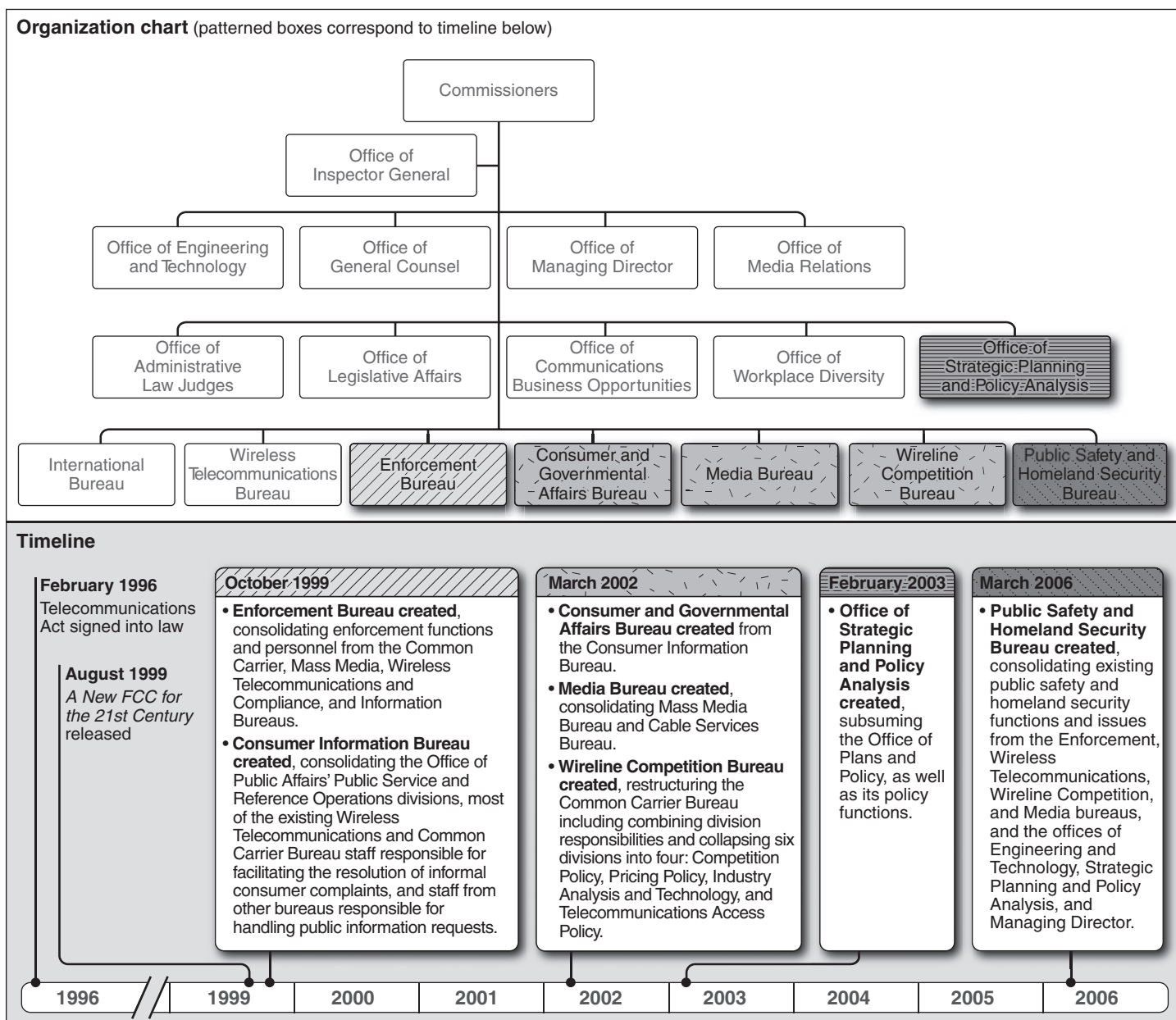
In 2006, under Chairman Martin,<sup>26</sup> FCC established the Public Safety and Homeland Security Bureau, consolidating existing public safety and homeland security functions and issues from the Enforcement, Wireless Telecommunications, Wireline Competition, and Media Bureaus, and the offices of Engineering and Technology, Strategic Planning and Policy Analysis, and Managing Director. Figure 2 shows FCC's current structure and how the bureaus and offices have changed since the Telecommunications Act.

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<sup>26</sup>FCC Chairman, March 2005 to January 2009; FCC Commissioner, July 2001 to March 2005.



**Figure 2: FCC Organization Chart and Timeline of Changes**



Source: GAO analysis of FCC data.

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Despite these changes in FCC's organizational structure, the changing telecommunications market and the development of new technologies have created new issues that span several bureaus. For example, broadband services—which became available in the late 1990s—do not fall exclusively within the jurisdiction of a particular FCC bureau or regulatory category. As a result, FCC created broadband regulations in a piecemeal fashion, issuing four separate orders (one for cable modems, one for facilities-based wireline broadband Internet access, one for broadband over power line, and one for wireless broadband Internet access) to regulate competing methods of providing broadband services by the same standard. The Telecommunications Act allows FCC to classify services as telecommunications services<sup>27</sup> or information services,<sup>28</sup> the latter being subject to fewer regulatory restrictions. In 2002, FCC determined that cable modem service should be categorized as an information service.<sup>29</sup> Three years after FCC issued the cable modem order and shortly after the Supreme Court upheld FCC's regulatory classification for cable modem service,<sup>30</sup> FCC adopted an order that granted providers of facilities-based wireline broadband Internet access the same regulatory classification and treatment as cable modem Internet access providers.<sup>31</sup> In November 2006, FCC issued an order classifying broadband over power line-enabled

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<sup>27</sup>Under the Telecommunications Act, telecommunications service is defined as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. 47 U.S.C. § 153(46). Telecommunications is defined as the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. 47 U.S.C. § 153(48).

<sup>28</sup>Under the Telecommunications Act, information service is defined as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. 47 U.S.C. § 153(20).

<sup>29</sup>*Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

<sup>30</sup>*Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), rev'd *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

<sup>31</sup>*Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005), *aff'd Time Warner Telecom. Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

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Internet access service as an information service.<sup>32</sup> In March 2007, FCC issued an order classifying wireless broadband Internet access as an information service.<sup>33</sup> In addition, as companies that once provided a distinct service (such as cable and telephone companies) have shifted to providing bundles of services (voice, video, and data services) over a broadband platform, new debates have arisen regarding how rules previously intended for a specific industry and service (such as universal service, customer retention rules, and video franchising rules) should be applied to companies now providing multiple services. FCC officials told us they are currently looking across the agency to identify challenges that convergence poses to the existing structure and will first focus on how FCC's systems, such as its data collection efforts, can be modified to address these challenges, but they may consider structural changes later.

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### FCC Lacks Written Policies for Ensuring the Interbureau Collaboration and Communication Needed to Address Crosscutting Issues

According to agency officials, FCC uses informal interbureau collaboration, working groups, and task forces to address convergence and crosscutting issues, but FCC lacks written policies outlining how interbureau coordination and collaboration is to occur.<sup>34</sup> FCC handles convergence by holding interbureau meetings to discuss the progress of items and to address upcoming issues. When a crosscutting item requires the input of multiple bureaus or offices, one is considered the "lead" and is responsible for coordinating with all other bureaus or offices that have a direct concern or interest in the document and ensuring they have the opportunity to review and comment on an agenda item prior to submission to the commission. Generally, if a proceeding (such as a petition or draft order) clearly falls under a specific bureau's purview, that bureau will serve as the lead on the issue. The determination of the lead bureau is made by each bureau's management or by the precedence of which bureau

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<sup>32</sup>*United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006).

<sup>33</sup>*Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

<sup>34</sup>FCC's *Agenda Handbook* outlines the process for preparing, approving, and releasing decision documents at FCC and notes that "bureau/office chiefs are responsible for ensuring that their items are fully coordinated with other interested bureaus/offices" and "items should be fully coordinated with all applicable bureaus/offices before they are circulated to the commissioners." The most recent full version of the handbook was issued in March 2000, but FCC is updating selected sections for 2009. Neither the full version of the handbook or the draft 2009 update is publicly available.

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handled a particular issue in the past. For example, the Wireless Telecommunications Bureau would be the lead for items regarding licensed spectrum rules because it has handled these issues in the past. FCC officials told us that on more complex issues, or items that do not have an evident lead bureau, the chairman is ultimately responsible for selecting the lead bureau. Although FCC relies on this interbureau coordination, it does not provide specific steps or guidance regarding how or when this coordination is to occur, with some limited exceptions.<sup>35</sup> FCC officials confirmed that there are no written policies outlining how the bureaus should coordinate with one another.

FCC's lack of written policies and its reliance on informal interbureau coordination to address issues that span beyond the purview of a single bureau can result in inefficiencies. For example, one FCC official told us that while FCC was conducting a merger review of two major media companies, the review process was delayed because of confusion regarding which bureau was responsible. Since each of the companies merging had assets regulated by different FCC bureaus, it was unclear which bureau was the designated lead and would be responsible for a specific portion of the merger review process. Although the chairman eventually designated a lead bureau, the time it took for this to happen slowed down the process, and the overall lack of coordination made the process less efficient. Our *Internal Control and Management Evaluation Tool*<sup>36</sup> emphasizes the importance of internal communications, specifically noting the need for mechanisms that allow for the easy flow of information

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<sup>35</sup>For example, the *Agenda Handbook* noted that certain bureaus and offices should be consulted on specific issues, such as requiring a statement that the bureau or office coordinated with the International Bureau on issues with an international dimension. In addition, according to FCC's internal procedures, all items that raise spectrum allocation, technical standards, or efficiency issues should be coordinated with the Office of Engineering and Technology, and all items that have field enforcement consequences should be coordinated with the Consumer and Governmental Affairs Bureau.

<sup>36</sup>GAO issues standards to provide an overall framework for establishing and maintaining internal control and for identifying and addressing major performance challenges and areas at the greatest risk for fraud, waste, abuse, and mismanagement. GAO, *Internal Control Management and Evaluation Tool*, [GAO-01-1008G](#) (Washington, D.C.: Aug. 1, 2001).

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down, across, and up the organization, including communications between functional activities.<sup>37</sup>

In addition, the absence of written policies allows interbureau collaboration and communication to vary from chairman to chairman. FCC officials noted significant differences between prior chairmen's emphasis on bureau interaction. For example, former Chairman Kevin Martin required staff to seek approval from management before contacting other bureau and office staff. Current and former FCC officials told us that such policies limited interbureau collaboration and staff-to-staff communication. By contrast, then-Acting Chairman Copps instituted a weekly Chairman's Office Briefing with bureau and office chiefs, or their designees, and a representative from each of the commissioners' offices with the stated intent of promoting openness, a practice that continues under Chairman Genachowski. In addition, an FCC official told us that under Chairman Powell, FCC had a memorandum outlining how one bureau was to note its concurrence or disagreement with a draft order prepared by another bureau, but that the practice largely lapsed under Chairman Martin.

The lack of written policies also allows the chairman complete discretion when assigning bureau staff to address an item, leading to instances where all relevant staff were not included in developing an item. For example, according to FCC officials, the Wireless Telecommunications Bureau was not included in drafting a universal service order that increased the portion of universal service funding provided by wireless customers. FCC officials told us the resulting order did not fairly characterize the wireless industry's prior efforts, which led the industry to file reconsideration petitions that required additional time to address. Other officials told us that in 2008, FCC received filings in its Wireline Competition Bureau and its Enforcement Bureau regarding allegations that Comcast was

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<sup>37</sup> Additionally, GAO previously found a number of practices that can help enhance and sustain collaboration among federal agencies that can also apply to collaboration between bureaus and offices. These practices include establishing compatible policies, procedures, and other means to operate across boundaries, identifying and addressing needs by leveraging resources, and agreeing on roles and responsibilities. GAO, *Results-Oriented Government: Practices That Can Help Enhance and Sustain Collaboration among Federal Agencies*, [GAO-06-15](#) (Washington, D.C.: Oct. 21, 2005).

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discriminating against customers using peer-to-peer<sup>38</sup> sharing protocols to exchange videos. FCC officials told us that then-Chairman Martin directed the Office of General Counsel to draft a resolution without coordinating or discussing the issue with the other bureaus and that this caused uncertainty in the Enforcement Bureau regarding how to address pending complaints.

FCC officials and outside stakeholders stated that communication among bureaus is necessary for addressing convergence and other crosscutting issues under the current bureau structure. Three FCC officials told us that convergence in the telecommunications market requires FCC's bureaus to actively communicate with one another so they can address issues that span multiple bureaus. One of these officials also noted that convergence makes active communication among bureaus even more important because if communication fails or does not take place, issues might inadvertently not be addressed before the information is presented to the commissioners and their staff.

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**FCC Relies on Its Functional Offices to Address Some Aspects of Convergence, but the Chairman's Influence Over These Offices Raises Independence Issues That Can Affect FCC's Ability to Rely on Them**

FCC's functional offices, such as the Office of Engineering and Technology (OET) and the Office of Strategic Planning and Policy Analysis (OSP), provide a broader scope than the platform-based bureaus and address some of the issues posed by convergence, but the chairman's influence can affect FCC's ability to use these offices to address crosscutting issues.<sup>39</sup>

With regard to OET, stakeholders, including commissioners and trade associations, have raised concerns about whether the chairman's authority over office staff impacts OET's ability to provide independent expertise. Two commissioners told us that although OET had high-quality staff, the commissioners question whether the information OET provides is impartial, since all bureau and office chiefs report to the chairman. One of the commissioners emphasized that without reliable unbiased information, it can be difficult to make good decisions on scientific and technical questions. Additionally, three trade associations also expressed concern

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<sup>38</sup>Peer-to-peer applications allow individual computer users to transmit data directly to another user, without the use of an intermediate network server. Individuals use peer-to-peer applications as an alternative means of transmitting content and programs over the Internet.

<sup>39</sup>This report focuses on OET and OSP because FCC officials told us these offices are responsible for addressing convergence and other crosscutting issues. See appendix II for a description of FCC's offices and bureaus.

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about the independent nature of OET, with one indicating that there is no way to tell if the information coming from OET is independent of the chairman or the best of several options.

Similarly, the emphasis FCC places on OSP and the work it does varies according to the chairman, and in recent years, OSP's output has diminished. OSP, working with the Office of Managing Director, is responsible for developing a strategic plan identifying short- and long-term policy objectives for the agency; working with the chairman to implement policy goals; and acting as expert consultants in areas of economic, business and market analysis, and other subjects that cut across traditional lines, such as the Internet. One former chief economist told us that each chairman has discretion over how he will use OSP, and therefore, the role of the office in providing economic analyses will depend on whether the chairman values economic research. Another former chief economist noted that FCC's emphasis on economic analysis depends on the chairman's preferences. OSP is responsible for producing publicly available work papers that monitor the state of the communications industry to identify trends, issues, and overall industry health. However, OSP did not release any working papers between September 2003 and February 2008 and has not released any working papers since issuing three in February 2008. Given OSP's responsibility in developing a strategic plan that identifies short- and long-term policy objectives for the agency, a lack of research can put FCC at a distinct disadvantage in preparing for the future.

To address these issues, some stakeholders we spoke with suggested that adding more resources to OSP or creating a separate economics bureau would allow for more independent and robust economic analysis. One former chief economist told us that although the research function of FCC is under OSP's purview, OSP does not have the resources needed, and providing additional resources would help them produce more independent and higher-quality analyses. A former chairman expressed similar concerns about OSP's resources. Two other former chief economists suggested that if economists were centralized in one group or office, then economic analysis would have greater influence in the decision-making process. Similarly, a researcher found that another independent regulatory agency's use of an independent and centralized Bureau of Economics leads to routine use of cost-benefit analysis during

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its investigations and enforcement actions.<sup>40</sup> Finally a trade association told us that OSP has always been on the periphery of the policy-making process because it lacks the budget and staff levels to complete comprehensive industry analysis, and that OSP needs additional resources to perform more useful policy analysis.

While some stakeholders have suggested consolidating economists in a centralized bureau, others have noted the need to maintain economic expertise within the bureaus. Officials from each bureau we spoke with told us having economists imbedded in each bureau was useful because it allows the bureaus to access economic expertise more easily. For example, economists may lead teams on particular issues, review mergers, gather subscriber data, create economic development policies, manage industry reporting, and produce economic reports and information, and a bureau's ability to function could suffer if the economists were taken out of the bureau. One study that examined organizational structures for attorneys and economists in enforcement agencies found that having economists and attorneys working together in the same division and organized around a particular industry or sector, as they do at FCC, is advantageous for a number of reasons.<sup>41</sup> The study found the main advantage of this structure is that it focuses economic analysis on the questions of interest to the ultimate decision makers. Additionally, the strong links between economists and attorneys working in the same division help to ensure that economists are answering all the legally relevant questions and the decision makers can direct the efforts of economists to answer the questions that concern them. However, these arguments do not necessarily preclude the need to examine OSP's role and determine whether it is able to address the economic implications of broad policy issues.

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<sup>40</sup>Jonathan B. Baker, "Continuous' Regulatory Reform at the Federal Trade Commission," *Administrative Law Review*, vol. 49 (1997): 859-874.

<sup>41</sup>Luke M. Froeb, Paul A. Pautler, and Lars-Hendrik Röller, "The Economics of Organizing Economists" *Vanderbilt Law and Economics Research Paper No. 08-18* (July 3, 2008). Available at SSRN, <http://ssrn.com/abstract=1155237>.



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## Little Consensus Exists on Whether or How to Restructure FCC's Bureaus and Offices

Several stakeholders have proposed a variety of options for restructuring FCC. One proposal is to replace industry-based bureaus with bureaus divided along functional goals. Some stakeholders have expressed concerns that FCC's current bureau structure may lead to bureaus identifying with the industry they regulate, rather than taking an overarching view of an issue. One trade group representative and a former FCC chairman stated that this leads to "fiefdoms," where the staff members begin to act more like advocates for the industry they are regulating than as experts looking for the best decision. In addition, stakeholders stated that the culture of the bureaus may vary—depending on their history and the industry they regulate—and that this could create problems if competing services are treated differently based on which bureau is responsible for regulating the service. In response to such concerns, some stakeholders suggested that FCC create new functional bureaus that focus on areas that span a variety of service providers and industries, such as competition, licensing, and spectrum management. For example, one former FCC official suggested that FCC could create one bureau to handle spectrum management issues, which are currently divided among the Wireless Telecommunications Bureau, the Office of Engineering and Technology, the International Bureau, and the Public Safety and Homeland Security Bureau. Another stakeholder suggested FCC structure bureaus along overarching policy goals, such as culture and values (which would include broad issues such as obscenity, advertising rules, and public broadcasting) and markets (which would include allocation of spectrum, competition, and market analysis). The stakeholder stated that by reorganizing along such lines, FCC would create departments with technology and industry-neutral responsibilities for key social mandates, which would better enable FCC to address issues that span industry lines.

However, a number of stakeholders and FCC officials expressed caution when discussing restructuring or reforming the bureaus. Restructuring is often resource-intensive and disruptive for an agency and can impact staff morale. In addition, it is unclear whether restructuring the bureaus would improve FCC's ability to regulate these industries, since the Communications Act, as amended, establishes different regulatory regimes based on how a service is provided. Some industry and FCC stakeholders we interviewed also noted that in some cases, the current bureau structure works well, such as when issues fall within a specific bureau's purview. For example, one FCC official noted that in some cases, it is useful to have various functions housed in a specific industry-based bureau, explaining that since rulemaking and licensing functions are housed in the Wireless Telecommunications Bureau, bureau staff understand the implications of

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administering the licensing rules made during the rulemaking process. Similarly, FCC officials stated that the industry-based bureaus allow staff to develop in-depth expertise on an issue. For example, an FCC official stated that the Media Bureau's video division staff understand how to address most broadcast licensing and market issues and that splitting up the staff could result in a loss of group cohesion and institutional knowledge.

Regardless of the organizational structure FCC decides to pursue, it is certain that technological advances and marketplace changes will contribute to an evolving regulatory landscape for the commission. To anticipate and quickly respond to these changing conditions, FCC will need mechanisms to ensure that staff can routinely and reliably coordinate and communicate across bureaus in order to foster and harness FCC's collective knowledge on issues that span the bureaus. The absence of written policies outlining how bureaus should communicate and collaborate on crosscutting issues has led to inefficiencies in FCC's decision-making process by leaving the extent to which interbureau collaboration occurs subject to the preferences of the chairman.

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## Weaknesses in FCC's Processes for Collecting and Using Information Can Undermine the Transparency and Effectiveness of the Decision-Making Process

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### Inconsistent Policies Regarding Commissioner Access to Bureau and Office Analyses Raise Concerns about the Transparency and Effectiveness of the Decision-Making Process

FCC chairmen have varied in their policies regarding commissioner access to bureau and office analyses during the decision-making process. For example, then-Acting Chairman Copps publicly stated that commissioners would have unfettered access to the bureaus, adding that bureaus should respond to requests from commissioners' offices directly and as quickly as possible, without preapproval from the chairman's office.<sup>42</sup> In addition, former Chairman Kennard established internal procedures outlining how commissioners should receive information from bureaus and offices during the decision-making process.<sup>43</sup> These procedures specified that bureau and office chiefs would provide detailed oral briefings or memoranda on upcoming items upon the request of commissioners and would solicit feedback from commissioners while developing draft items. Under Chairman Martin, there was a perception among some FCC commissioners and staff that the commissioners could not easily access bureau and office analyses. Stakeholders also told us that some previous chairmen had similarly limited commissioner access to bureau and office analyses. One rationale behind such policies was that giving the commissioners unrestricted access to agency staff could hinder the decision-making process by allowing commissioners to search for support among the bureau staff for any given position. Similarly, some stakeholders expressed concerns about providing commissioners full

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<sup>42</sup>Michael J. Copps, *Remarks of Acting Chairman Michael J. Copps to the Federal Communications Commission Staff* (Washington, D.C., Jan. 26, 2009).

<sup>43</sup>William E. Kennard, *Memorandum on Decision-Making Procedures* (Washington, D.C., Jan. 15, 1998).

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access to bureau staff. For example, one FCC official recounted prior instances in which commissioners requested information that placed bureau staff in the middle of commission-level policy disputes, and a former FCC official expressed concerns about commissioners making requests that could tie up bureau resources.

No explicit statutory or regulatory language exists that outlines commissioners' access to internal information. The Communications Act, as amended, states that it is the duty of the chairman to coordinate and organize the work of the commission in such a manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the commission.<sup>44</sup> In implementing this, FCC's chairman sets the agency's agenda by directing the work of the bureaus and offices to include drafting agenda items for commission consideration. While *FCC's Agenda Handbook* does specify that the bureaus and offices should provide commissioners copies of draft items for consideration and editing 3 weeks before the commission votes on the item at a public meeting, it does not specify the extent to which commissioners have access to the bureau and office staff and their analyses, including their ability to ask the staff questions about draft items or the analyses supporting those items. The absence of internal policies or statutory requirements has enabled each chairman to define how and when other commissioners receive bureau and office analyses during the decision-making process.

Controlling commissioner access to staff analysis and opinions may subvert the commission decision-making process and raises concerns among FCC officials and external stakeholders regarding the transparency and informed nature of the decision-making process. Many stakeholders we interviewed, including former FCC officials and current FCC commissioners and bureau officials, noted the importance of bureau analyses to the commission's decision-making process, with some stating that commissioners' lack of access to bureau analyses can negatively impact the quality of FCC's decisions. Two bureau officials explained that providing commissioners access to information improves FCC's decisions by allowing for more informed deliberations. FCC officials also told us that in situations where commissioners are unable to access information from the bureaus and offices, commissioners may refuse to vote on an item, thereby delaying decision making. The ability of the chairman to exert control over the bureau and office analyses provided to

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<sup>44</sup> 47 U.S.C. § 155.

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commissioners has raised concerns as to whether the information provided reflects the bureaus' and offices' independent analyses or the chairman's position on an issue. In addition, a current and a former commissioner stated that the chairman's ability to influence what information FCC staff provided to commissioners increased the commissioners' reliance on outside sources of information. The former commissioner noted that this raises concerns about the quality of information the commissioners may rely on and the transparency of the decision-making process, since private groups may be providing data that supports a particular agenda.

Regulatory bodies headed by multimember commissions, such as FCC, are often advocated and preferred over a department or agency headed by a single administrator because group decision making under conditions of relative independence is preferable to dominance by a single individual. For example, a major review of independent regulatory agencies concluded that a distinctive attribute of commission action is that it requires concurrence by a majority of members of equal standing after full discussion and deliberation, and that collective decision making is advantageous where the problems are complex, the relative weight of various factors affecting policy is not clear, and the choices are numerous.<sup>45</sup> Another study promoted the use of the commission structure for FCC in particular, stressing that the commission prevents a single administrator from having undue influence over the sources of public information.<sup>46</sup> We have also recognized the need to provide decision makers with the information needed to carry out their responsibilities. Our internal control standards state that information should be recorded and communicated to management and others within the entity who need it and in a form and within a time frame that enables them to carry out their responsibilities.<sup>47</sup>

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<sup>45</sup>The U.S. Commission on Organization of the Executive Branch of Government, "The Independent Regulatory Agencies: A Report With Recommendations" (Washington, D.C., 1949).

<sup>46</sup>The President's Advisory Council on Executive Organization, "A New Regulatory Framework: Report on Selected Independent Regulatory Agencies" (Washington, D.C., 1971).

<sup>47</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: November 1999).

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We also reviewed the policies of other independent regulatory agencies with regard to commissioner access to staff analyses. Officials at the Federal Energy Regulatory Commission and the Federal Trade Commission (FTC) told us that they do not have formal policies ensuring commissioner access to information, but stated that commissioners have not experienced problems obtaining information in the past. For example, an FTC official told us that the commission has had a long-standing practice that the commissioners have access to all of the information needed to perform their duties. However, the Nuclear Regulatory Commission (NRC) is statutorily required to ensure that commissioners have full access to the information needed to perform their duties and that commissioners share “equal responsibility and authority in all decisions and actions of the commission.”<sup>48</sup> In implementing this policy, NRC has developed and made publicly available its decision-making procedures, including commissioners’ rights to information.<sup>49</sup> These procedures outline the responsibilities of the chairman and the commissioners, how commissioners receive items from commission staff, and how items are voted on. Some of the key ways in which NRC’s procedures provide commissioners access to information include:

- Requiring that draft and final analyses by NRC staff are simultaneously provided to all commissioners, including the chairman.
- Establishing that each commissioner, including the chairman, has equal responsibility and authority in all commission decisions and actions, and has full and equal access to all agency information pertaining to commission responsibilities.
- Balancing commissioner access to staff analyses with the ability of the chairman to direct resource expenditures. For example, although individual commissioners can request information or analyses from NRC staff, if the request requires significant resources to fulfill and questions of priority arise, the office or the commissioner can request the chairman resolve the matter. If the chairman’s decision is not satisfactory to the requesting commissioner or the office, either can bring the matter for a vote before the full commission.

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<sup>48</sup> 42 U.S.C. § 5841(a)(1).

<sup>49</sup> Nuclear Regulatory Commission, *Internal Commission Procedures* (online), <http://www.nrc.gov/about-nrc/policy-making/internal.html> (last updated August 4, 2006).

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NRC officials told us that these long-standing internal procedures, which are reviewed approximately every 2 years, have been helpful in avoiding protracted disputes over the prerogatives and responsibilities of the chairman and the other commissioners and ensuring that access issues are handled consistently.

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## Stakeholders Have Raised Concerns about FCC's Collection of Information during the Rulemaking Process

### FCC Typically Does Not Include the Text of a Proposed Rule in Its NPRMs, Which May Limit the Effectiveness of the Public Comment Process

When issuing an NPRM to gather public input before adopting, modifying, or deleting a rule, FCC rarely includes the text of the proposed rule in the notice, which may limit the effectiveness of the public comment process. A 2008 FCC draft order noted that during the period 1990 through 2007, the commission issued approximately 3,408 NPRMs, 390 (or 11.4 percent) of which contained the text of proposed rules under consideration. According to *A Guide to Federal Agency Rulemaking*, a resource guide created by the Administrative Law and Regulatory Practice and Government and Public Sector Lawyers Division of the American Bar Association,<sup>50</sup> “most agencies publish the text of the proposed rule when commencing rulemaking, and some enabling statutes expressly require that the agency do so.”<sup>51</sup> Widespread concern exists regarding the lack of details provided in FCC's NPRMs, which generally ask for comment on wide-ranging issues, making the NPRM more like a Notice of Inquiry (NOI). FCC officials told us that FCC uses NPRMs rather than NOIs (the traditional method of gathering broad input on a topic) so that it can proceed directly to issuing a rule once one is developed. By contrast, if FCC used an NOI to gather information, then it would need to issue an NPRM before issuing a rule. Several stakeholders have stated that such broad NPRMs limit their ability to submit meaningful comments that

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<sup>50</sup>Jeffrey S Lubbers, *A Guide to Federal Agency Rulemaking*, 4th ed. (Chicago, Ill.: American Bar Association, 2006).

<sup>51</sup>Lubbers, *A Guide*, p. 279, Federal Trade Commission Act, 15 U.S.C. §57 a(b)(1)(A) (stating that an agency must “publish a notice of proposed rulemaking including with particularity the text of the rule including any alternatives which the commission proposes to promulgate; and the reasons for the proposed rule”).

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address FCC's information needs and increase FCC's reliance on information provided in *ex parte* contacts. For example, the Small Business Administration's (SBA) Office of Advocacy noted its concerns about FCC's use of NPRMs instead of NOIs to collect broad information on a number of issues.<sup>52</sup> It argues that by issuing an NPRM that lacks specific proposals, the FCC creates uncertainty in the industry, resulting in thousands of comments that can only speculate as to what action the FCC may take and the potential impacts. SBA's Office of Advocacy adds that small businesses, in particular, are often overwhelmed by the scope of a vague NPRM and cannot contribute meaningfully to the rulemaking process. In addition, part of the value of the public comment process is derived from external stakeholders' ability to respond to other groups' comments, thereby improving the public debate on an item. However, if parties are unsure of FCC's intentions due to a lack of specificity in the NPRM and they submit general comments or wait until the *ex parte* process to provide input on an item, public debate can be limited.

The APA requires that an NPRM include "either the terms or substance of a proposed rule or a description of the subjects and issues involved."<sup>53</sup> Since the public is generally entitled to submit their views and relevant data on any proposals, the notice must be sufficient to fairly apprise interested parties of the issues involved, but it need not specify every precise proposal which the agency may ultimately adopt as a rule.<sup>54</sup> APA's requirements are satisfied when the rule is a "logical outgrowth" of the

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<sup>52</sup>Small Business Administration, Office of Advocacy, *RE: ex parte Presentation in a Non-Restricted Proceeding, Initial Regulatory Flexibility Analysis for 2002 Biennial Review – Review of the Commission's Broadcast Ownership Rules*, MB Dkt. No. 02-277 (Washington, D.C., Apr. 9, 2003).

<sup>53</sup>5 U.S.C. § 553(b)(3).

<sup>54</sup>*Action for Children's Television v. FCC*, 564 F.2d 458, 470 (D.C. Cir. 1977) (internal quotation marks and citations omitted).



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actions proposed, which means that interested parties “should have anticipated the agency’s final course in light of the initial notice.”<sup>55</sup>

Although APA does not specifically require that NPRMs contain proposed rule text, some studies of federal rulemaking have identified the benefits of providing proposed rule text for public comment. For example, *A Guide to Federal Agency Rulemaking* notes that “specific proposals help focus public comment, and that, in turn, assists reviewing courts in deciding whether interested persons were given a meaningful opportunity to participate in the rulemaking ... a focused and well-explained NPRM can educate the public and generate more helpful information from interested persons.”<sup>56</sup> Similarly, in its analyses of transparent governing and public participation in the rulemaking process, ICF International<sup>57</sup> recommended that agencies garner more substantive public comments by issuing an Advanced Notice of Proposed Rulemaking that lays out specific options under consideration and asks specific questions that are linked to a Web form.<sup>58</sup>

Several stakeholders, including officials at FCC, have recognized that the lack of details in NPRMs is an issue and have proposed changes. A 2008 FCC draft order<sup>59</sup> advocated that FCC publish the text of proposed rules in

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<sup>55</sup> See *Long Island Care At Home, LTC v. Evelyn Coke*, 551 U.S. 158, 174 (2007). (The APA requires an agency conducting notice-and-comment rulemaking to publish in its NPRM “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3). The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be “a ‘logical outgrowth’ of the rule proposed.” *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (CA2 1986). See also, e.g., *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 208 U.S. App. D.C. 60, 647 F.2d 1189, 1221 (CA DC 1980), cert. denied *sub nom. Lead Industries Asso. v. Donovan*, 453 U.S. 913, 101 S. Ct. 3148, 101 S. Ct. 3149, 69 L. Ed. 2d 997 (1981); *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (CA1 1974). The object, in short, is one of fair notice.)

<sup>56</sup> Lubbers, *A Guide*, pp. 280, 292.

<sup>57</sup> ICF International is a global professional services firm that partners with government and commercial clients to deliver consulting services and technology solutions in energy, climate change, environment, transportation, social programs, health, defense, and emergency management.

<sup>58</sup> Gary Light, Will Baird, and David Bruce, *Transparent Governing: Applying Information Technology to Improve Public Involvement in Rulemaking*, a report prepared by ICF International, 2008, p.4.

<sup>59</sup> According to an FCC official, this draft order was created in response to a request from then-Chairman Kevin Martin, but it was not circulated to the other commissioners.

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NPRMs to better inform the debate about matters under commission consideration and to increase FCC's accountability to the American public. A current and a former commissioner we interviewed also suggested that FCC publish the proposed rules for comment in its NPRMs, stressing the importance of the information provided in NPRMs in the decision-making process. For example, in a letter proposing various reforms to incoming Chairman Genachowski, Commissioner McDowell noted the need for NPRMs to include proposed rules, stating this would benefit Congress, the public, and the other commissioners. In addition, trade organizations sent letters to the Presidential Transition Task Team supporting the inclusion of proposed rule text in FCC's NPRMs. In April 2009, Representatives Joe Barton and Cliff Stearns introduced H.R. 2183, which proposed a number of FCC reforms, including provisions that require the agency to publish the specific language of any proposed adoption, modification, or deletion of regulations, and provide the public 30 days to submit comments and another 30 days to submit reply comments before the commission acts on the proposed adoption, modification, or deletion.<sup>60</sup>

In addition, some stakeholders have suggested that FCC should rely more heavily on its administrative law judges<sup>61</sup> to develop a record on which to base decisions. These stakeholders stated that by allowing parties to cross-examine one another, and to testify and submit evidence under oath, administrative law judge proceedings would ensure the commission was basing its decisions on tested facts and data. However, officials from other commissions that use administrative law judges noted that while these proceedings are useful for addressing factual disputes, such as rate disputes or contesting charges of law violations, they are not useful in making policy decisions because they are too legalistic and time-consuming. An official in FCC's Office of General Counsel expressed concern about the usefulness of administrative law judges in a rulemaking

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<sup>60</sup> H.R. 2183, 111th Cong. (2009).

<sup>61</sup> An administrative law judge, appointed under the APA, presides at a hearing during which documents and sworn testimony are received in evidence and witnesses are cross-examined. At the conclusion of the evidentiary phase of a proceeding, the presiding administrative law judge writes and issues an initial decision which may be appealed to the commission. FCC currently has one administrative law judge, and the Office of Administrative Law Judges issued three initial decisions from 2005 to 2007. FCC told us that during that time period, the two administrative law judges at FCC also issued at least three settlement decisions each year and handled cases for the Bureau of Alcohol, Tobacco, Firearms and Explosives and for U.S. Customs and Border Protection.

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Weaknesses in FCC's *ex parte* Process Have Negatively Impacted Stakeholder Perceptions of Transparency and Public Participation in FCC's Decision-Making Process

proceeding, noting that stakeholders generally submit policy arguments, rather than arguments about factual issues. In addition, while the rulemaking process allows for a large number of parties to submit comments, an administrative law judge proceeding could not accommodate the same volume of participants and would require that FCC decide which parties should participate in cross-examining witnesses and evidence. In addition, an official in FCC's Office of General Counsel and other stakeholders raised concerns that the process could lengthen the decision-making process and would require that FCC increase its administrative law judge staff.

FCC's current *ex parte* process can lead to vague or last-minute *ex parte* summaries of meetings between FCC and external officials. The APA places no restriction on *ex parte* communication between agency decision makers and other persons during informal rulemaking. However, FCC has rules about such contacts that are intended 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. Stakeholders must provide FCC with two copies of written *ex parte* presentations and the original and a copy of a summary of the new information provided during oral *ex parte* contacts to be filed in the public record. FCC places the burden of preparing and ensuring that an *ex parte* summary is complete on the external party.<sup>62</sup> FCC's *ex parte* rules provide general guidance on what is sufficient, stating that the summaries should generally be "more than a one or two sentence description" and not just a listing of the subjects discussed.<sup>63</sup> When it is unclear whether data or arguments presented in an *ex parte* contact are already in the public record, FCC advises that parties briefly summarize the matters discussed at the meeting. FCC officials told us that they are in the process of reviewing and potentially changing the *ex parte* process.

However, stakeholders expressed concerns about the submission of vague *ex parte* summaries under the current process. For example, an *ex parte* summary may simply state that an outside party met with FCC officials to

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<sup>62</sup>As previously noted, in permit-but-disclose proceedings, *ex parte* presentations by members of Congress or their staffs and other federal agencies or their staffs need be disclosed only if they are of substantial significance and clearly intended to affect the ultimate decision in the proceeding. Disclosure of *ex parte* presentations by members of Congress or their staffs and other federal agencies or their staffs will generally be made by the commission's staff.

<sup>63</sup>47 C.F.R. § 1.1206(b)(2).

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share its thoughts on a proceeding. Stakeholders told us that vague *ex parte* summaries reduce transparency and public discourse in FCC's decision-making process by limiting stakeholders' ability to determine what information was provided in the meeting and to discuss or rebut that information. In 2002, an FCC commissioner stated that she believed that the "cursory [ex parte] filings that [FCC] routinely permits" are an apparent violation of its rules requiring more than a one or two sentence description.<sup>64</sup> Similarly, a former acting chairman noted the need to "enhance, or at least enforce," FCC's *ex parte* rules so that the public will find more than a brief *ex parte* letter that only identifies who attended a meeting, rather than what was said in the meeting.<sup>65</sup>

According to FCC, the *ex parte* process is an important avenue for FCC in collecting and examining information during the decision-making process. FCC has previously told us that it generally 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, according to an official in FCC's Office of General Counsel, *ex parte* meetings allow stakeholders and FCC to focus on specific issues of interest to FCC and to identify potential weaknesses in the existing arguments. An official in FCC's Office of General Counsel recognizes concerns that some *ex parte* summaries are cursory and vague and noted that to address this, FCC periodically sends reminders to commenters regarding the information required in *ex parte* summaries and has placed additional information about the required information on FCC's Web site. In 2000, FCC issued a public notice reiterating the public's responsibilities in the *ex parte* process. This notice stated "the duty to ensure the adequacy of *ex parte* notices ...rests with the person making the presentation. Staff members have the discretion to request supplemental filings if they feel that the original filing is

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<sup>64</sup>Kathleen Q. Abernathy, "My View from the Doorstep of FCC Change," *Federal Communications Law Journal*, vol. 54, no. 2 (2002): 219.

<sup>65</sup>Michael J. Copps, "Remarks of Acting FCC Chairman Michael J. Copps," *FCBA Seminar: The Communications Act and the FCC at 75*, (Washington, D.C., Feb. 24, 2009).

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inadequate, but the obligation to file a sufficient notice must be satisfied regardless of possible requests by the staff.”<sup>66</sup>

FCC does not proactively determine whether the content of the summaries is sufficient. Specifically, FCC relies on a complaint-driven process to ensure that *ex parte* submissions comply with FCC’s rules. FCC’s Office of General Counsel reviews *ex parte* communications if it receives a complaint.<sup>67</sup> However, since the parties not present at the meeting are generally unsure as to what occurred, it is difficult for external stakeholders to determine whether an *ex parte* submission is sufficiently detailed. In addition, it can be difficult to determine if an *ex parte* summary is sufficient, because if a party is simply restating information it has already presented, then it can file a short *ex parte* summary or none at all. After the Office of General Counsel receives a complaint, it provides copies to the party referred to in the complaint and to the FCC staff present during the meeting, and the parties provide a written response to the office about their version of events. The Office of General Counsel is responsible for determining whether the issue has been appropriately resolved. FCC receives, on average, one complaint a month about *ex parte* communications.

Other aspects of the *ex parte* process can challenge stakeholders’ ability to submit information during FCC’s decision-making process. For example, one group noted that unlike public comments, which must be submitted by a specific deadline, the *ex parte* process does not have a definitive end date and groups must expend their resources tracking *ex parte* submissions until the relevant item is voted on by the commission. In addition, stakeholders must attempt to determine what information was provided based on summaries of the *ex parte* meeting and submit written responses or attempt to meet with FCC officials to offer a countervailing viewpoint. This can present a particular burden for stakeholders with limited resources for tracking and responding to *ex parte* contacts. For example, two organizations told us that it is more difficult for groups that must travel to Washington, D.C., to participate in person at *ex parte* meetings than for groups with a presence inside Washington. One organization told us of instances in which FCC canceled

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<sup>66</sup>Commission Emphasizes the Public’s Responsibilities in Permit-But-Disclose Proceedings, Public Notice, 15 FCC Rcd 19945 (2000).

<sup>67</sup>47 C.F.R. §0.251(g).

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meetings with them at the last minute, after the group traveled from outside of Washington, D.C, to meet with FCC.

Several stakeholders also raised concerns regarding prior incidents in which parties made substantive *ex parte* submissions just before or during the Sunshine period, during which external contact with FCC officials is restricted, and thus, other groups are unable to respond to the information provided. Although, subject to certain exceptions, external parties are forbidden from contacting FCC officials after release of the Sunshine Notice (generally 1 week prior to a vote), FCC officials are allowed to initiate contact with external parties for additional information on an agenda item. This can lead to *ex parte* submissions affecting decisions without allowing for public comment on the information provided. For example, during the AT&T BellSouth merger review, an *ex parte* communication occurred the day before the scheduled vote. During the communication, FCC proposed merger conditions and the *ex parte* summary was filed the day of the proposed vote, thus preventing public comment and expert review. However, in response to complaints from the other commissioners, Chairman Martin delayed the merger vote to allow for public comment on the new changes. An official in FCC's Office of General Counsel told us that there are legitimate concerns about stakeholders' ability to respond to *ex parte* presentations made during the Sunshine period, pursuant to a Sunshine period exception, but added that if this occurs, stakeholders can request to be invited by FCC officials to file a counter *ex parte* communication. Finally, although parties are required to file a summary of *ex parte* contacts with FCC's Secretary, all commissioners may not receive a copy of this summary. For example, if a paper copy is filed shortly before a scheduled vote, there may not be adequate time for the summary to be scanned and placed in the public record. FCC officials told us that there is currently no mechanism for notifying commissioners that *ex parte* summaries have been filed and added that commissioners rely on the public record to identify this information.

Other federal agencies have implemented different guidelines for the *ex parte* process. For example, the Department of Transportation (DOT) issued an order and accompanying procedures, noting the importance of providing interested members of the public adequate knowledge of contacts between agency decision makers and the public during the rulemaking process. DOT establishes that if such contact occurs prior to the issuance of an NPRM and is one of the bases for the issuance of the NPRM, the contact should be discussed in the preamble of the notice. In addition, although DOT recommends holding such contact to a minimum

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after the close of the reply comment period, noting that contacts occurring at this stage of the process tend to be hidden, DOT states that if such contacts do occur, the meeting should be announced publicly or all persons who have expressed interest in the rulemaking should be invited to participate. In addition, DOT requires that records of such contacts be promptly filed in the public record and states that while a verbatim transcript is not required, a mere recitation that the listed participants met to discuss a named general subject on a specified day is inadequate. Rather, DOT notes that such records should include a list of the participants, a summary of the discussion, and a specific statement of any commitments made by department personnel.

Officials from FTC told us that the agency personnel are responsible for submitting *ex parte* communications in writing to the FTC Secretary so that they can be placed on the public record.<sup>68</sup> NRC officials told us that if comments submitted after the public comment period raise a significant new idea, NRC would place those comments in the record and might reopen the comment period to get reactions to the submission. NRC officials also noted that when NRC issues a request for public comments, comments received after the due date will be considered if it is practical to do so, and that NRC does reopen or extend a comment period to give people more time to consider complex issues.

Stakeholders concerned about FCC's current *ex parte* process have suggested a number of changes. Some of the suggestions included enhancing FCC's guidelines regarding *ex parte* summaries to include requiring that FCC officials reject incomplete *ex parte* summaries or requiring them to certify that the *ex parte* summaries they receive accurately capture the substance of the information provided in meetings, improving FCC's enforcement of its *ex parte* requirements, and limiting FCC's use of last-minute *ex parte* contacts to inform its decisions. An FCC official noted that one possible solution to *ex parte* submissions made during the Sunshine period would be to create an automatic right to respond for other stakeholders, but added that allowing for more contact during the Sunshine period would run counter to the idea of establishing a quiet period for the commissioners to consider an issue before voting. FCC is currently in the process of considering possible revisions to its *ex parte* policies and is exploring new methods of collecting public

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<sup>68</sup>FTC's regulations regarding the permissibility of *ex parte* contacts vary depending on the type of proceeding.

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comment. One method under consideration includes collecting comments through its [www.broadband.gov](http://www.broadband.gov) Web site, which allows members of the public to comment on a blog, request *ex parte* meetings, and obtain information about upcoming workshops. On October 28, 2009, FCC held a workshop on improving disclosure of *ex parte* contacts, during which participants discussed possible revisions to FCC's current *ex parte* rules and processes.

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### Some Academic and Industry Stakeholders Think FCC's Merger Review Process Allows the Agency to Implement Policy Decisions Outside of the Rulemaking Process

Some academic and industry stakeholders have voiced concerns that FCC's merger review process allows the agency to implement policy decisions without going through the rulemaking process. Companies holding licenses issued by FCC and wishing to merge must obtain approval from two federal agencies: the Department of Justice (DOJ)<sup>69</sup> and FCC, which do not follow the same standards when reviewing mergers. While DOJ is charged with evaluating mergers through an antitrust lens, FCC examines proposed mergers under its Communications Act authority to grant license transfers. The act permits the commission to grant the transfer only if the agency determines that the transaction would be in the "public interest, convenience, and necessity."<sup>70</sup> A recent Congressional Research Service report noted that the public interest standard is generally considered broader than the competition analysis authorized by the antitrust laws and conducted by DOJ.<sup>71</sup> The report concludes that the commission possesses greater latitude to examine other potential effects of a proposed merger beyond its possible effect on competition in the relevant market. In addition, FCC negotiates and enforces voluntary conditions on license transfers under the authority provided by §303(r) of the Communications Act,<sup>72</sup> which grants the commission the authority to "prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out the provisions" of the act, and §214(c),<sup>73</sup> which grants the commission the power to place "such terms and

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<sup>69</sup> Although DOJ generally will investigate telecommunications mergers, FTC may, in certain circumstances, investigate the proposed merger.

<sup>70</sup> 47 U.S.C. §214(a) and §310(d).

<sup>71</sup> Congressional Research Service, *Merger Review Authority of the Federal Communications Commission* (Washington, D.C., 2009).

<sup>72</sup> 47 U.S.C. §303(r).

<sup>73</sup> 47 U.S.C. § 214(c).



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conditions as in its judgment the public convenience and necessity may require.”

Several stakeholders told us that FCC has used its merger review authority to get agreements from merging parties on issues that affect the entire industry and should be handled via rulemaking, rather than fashioning merger-specific remedies. Stakeholders argue that this may lead to one set of rules for the merged parties and another set of rules for the rest of the industry. For example, rather than using an industry-wide rulemaking to address the issue of whether local telephone companies should be required to provide Digital Subscriber Line (DSL) service<sup>74</sup> without requiring telephone service, FCC imposed this requirement solely on AT&T and Verizon during merger reviews.<sup>75</sup> One stakeholder stated that by addressing broad policy issues through merger reviews rather than rulemakings, FCC is limiting public insight and participation in the regulatory process. Other stakeholders argue that FCC’s merger review process provides a needed public interest perspective.

In addition to concerns about FCC’s merger review process, there are also concerns about how FCC enforces its merger conditions. For example, one observer noted that despite requests from consumer groups such as Media Access Project and Public Knowledge, FCC declined to adopt specific enforcement mechanisms to ensure compliance with a series of conditions imposed during the merger review of XM and Sirius, including an “a la carte”<sup>76</sup> mandate and a requirement to provide noncommercial

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<sup>74</sup>DSL is a technology commonly used by local telephone carriers for providing high-speed data services by electronically enhancing conventional copper telephone voice line, enabling it to simultaneously provide both voice and high-speed data traffic.

<sup>75</sup>*AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007); *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005) (“SBC/AT&T Order”); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket FCC 06-189 (rel. March 26, 2007); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005).

<sup>76</sup>The “a la carte” option allows consumers to subscribe to and pay for only the programming they choose.

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channels.<sup>77</sup> FCC officials told us that each bureau is responsible for ensuring merger conditions are adhered to.

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## FCC Faces a Number of Workforce Challenges but Does Not Track the Progress of Its Efforts to Address Those Challenges

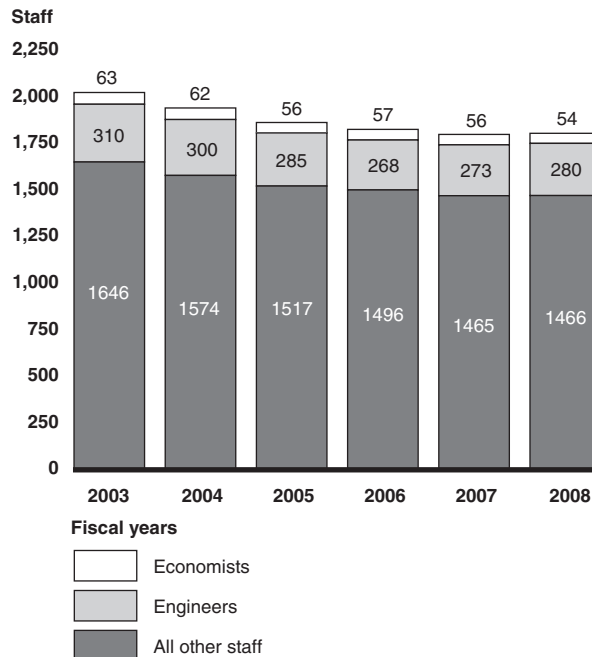
### Declines in the Number of FCC Engineering and Economic Staff and Large Numbers of Retirement-Eligible Staff May Impact FCC's Ability to Meet Its Mission

As part of the general decrease in FCC staff that occurred from fiscal year 2003 to 2008, the number of engineers and economists at FCC declined. (See fig. 3.) From fiscal year 2003 to 2008, the number of engineers at FCC decreased by 10 percent, from 310 to 280. Similarly, from fiscal year 2003 to 2008, the overall number of economists decreased by 14 percent, from 63 to 54. Although the number of engineers and economists has decreased from 2003 to 2008, the percentage of the workforce comprised of engineers and economists remained the same.

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<sup>77</sup>Philip J. Weiser, "FCC Reform and the Future of Telecommunications Policy," paper presented at *Reforming the FCC* conference held by Public Knowledge and Silicon Flatirons at the National Press Club, Washington, D.C., January 5, 2009. The paper is available online at <http://fcc-reform.org/paper/fcc-reform-and-future-telecommunications-policy>.

**Figure 3: Changes in the Number of Economists, Engineers, and Other Staff Employed at FCC**



Source: GAO analysis of FCC data.

The overall decline in the number of key occupational staff occurred during a period of increased need for technical, economic, and business expertise. New technologies, such as rapid growth in handheld and wireless devices, are challenging existing regulatory structures. FCC also cited a number of economic issues that impact the expertise and workforce required, such as marketplace consolidation and the need to craft economic incentives for incumbent spectrum users to relocate to other spectrum.

Additionally, 24 percent of FCC staff responses to the 2008 Office of Personnel Management (OPM) Federal Human Capital Survey disagreed with the statement “the skill level in my work unit has improved in the last year.” This was significantly more than the 17 percent of staff from all other agencies responding to the survey who disagreed with the statement. Similarly, several stakeholders we interviewed echoed the importance of increasing the level of expertise in certain areas at FCC and cited concerns regarding insufficient numbers of staff.

In addition to the decrease in engineers and economists, FCC faces challenges in ensuring that its workforce remains experienced and skilled enough to meet its mission, including a large number of staff who will be eligible for retirement.<sup>78</sup> FCC estimates that 45 percent of supervisory engineers are projected to be eligible for retirement by 2011. While FCC has started hiring a larger number of engineers to replace retiring engineers and augment its engineering staff, most hires have been at the entry level. Of the 53 engineers hired in fiscal years 2007 and 2008, 43 were entry-level hires. During this same period, 30 engineers retired. Stakeholders stated that recent graduates sometimes have little experience or understanding of how policies affect industry. Increasing the number of staff with backgrounds and experience in industry would help improve FCC's understanding of industry issues and can lead to better policies, according to stakeholders. For economists, FCC faces an even higher share of staff eligible for retirement by 2011. FCC reports that, as of April 2009, 67 percent of supervisory economists will be eligible to retire,<sup>79</sup> as shown in table 1. FCC may face challenges in addressing these impending retirements because 56 percent of nonsupervisory economists are also eligible to retire, and FCC has not hired any economists in fiscal years 2007 and 2008.

Table 1: Projected 2011 Retirement Eligibility for FCC Engineers and Economists	
	Estimate as of 2011
Supervisory engineers	45%
Nonsupervisory engineers	23
Supervisory economists	67
Nonsupervisory economists	56

Source: FCC data.

<sup>78</sup> Although most federal employees do not retire immediately upon becoming eligible, the number of employees becoming retirement-eligible in the near future points to the need for agencies to examine how these trends will affect them. OPM data from 2008 have indicated that roughly half of retirement-eligible employees are likely to still be employed 4 years after becoming eligible.

<sup>79</sup> According to FCC, although the number of supervisory economists eligible to retire is high, it is important to note that within FCC, economists are located throughout the bureaus and offices and are not necessarily supervised by other economists.

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Despite these trends, it is not clear how significantly the agency has been impacted in its ability to meet its mission. For example, the 2008 OPM Federal Human Capital Survey showed that, similar to the rest of government, 75 percent of FCC staff agreed with the statement that the workforce has the knowledge and skills necessary to accomplish organization goals. Agency officials also noted that they can shift staff from one bureau to another as needs arise and the regulatory environment changes. For example, as the need for tariff regulation decreased, FCC shifted staff from that area into other areas. However, an FCC official indicated that with the decrease in the number of experienced engineers throughout the agency, more work has shifted to OET. The official added that if the bureaus had additional resources to recruit and retain more experienced engineers, then they could handle more complex issues within the bureau without relying on OET as much. Furthermore, additional engineering staff would allow the bureau to reduce the amount of time it takes to conduct analyses and draft items. Additionally, former FCC officials told us that OSP needs additional resources to fulfill its mission.

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### Recruiting Has Been an Issue at FCC, and Staff Morale and Motivation Issues Could Exacerbate This Challenge

FCC faces multiple challenges in recruiting new staff. One challenge FCC faces (similar to other federal agencies) is the inability to offer more competitive pay. Additionally, not having an approved budget and working under congressional continuing resolutions has hampered hiring efforts for engineers and economists. Competing priorities may also delay internal decisions regarding hiring. For example, OSP has not received the budgetary allocation for hiring new economists in time for the annual American Economic Association meeting for at least the past 4 years. This meeting is the primary recruiting venue for recently-graduated economists. When FCC is not able to hire economists at the annual meeting, the agency potentially loses out on skilled employees who have been offered employment elsewhere. FCC officials told us that OSP has received permission to attend the 2010 American Economic Association meeting and hire at least one economist.

FCC also faces issues regarding the morale and motivation of its staff. According to the 2008 OPM Federal Human Capital Survey, FCC staff responses were significantly lower than other federal agencies' staff in areas related to motivation, engagement, and views of senior leadership. (See table 2.)

**Table 2: Comparison of FCC Responses and Responses from the Rest of the Government on Selected Items from the 2008 OPM Federal Human Capital Survey**

Questions	Percent of FCC respondents agreeing with statement	Percent of all other government respondents agreeing with statement	Difference between FCC and all other government responses
Leaders generate high levels of motivation and commitment in the workforce.	31	40	-9
Satisfied with the policies and practices of the organization's senior leaders.	32	42	-10
Employees have a feeling of personal empowerment with respect to work processes.	33	44	-11
Arbitrary action, favoritism, and coercion for partisan purposes are not tolerated.	35	48	-13

Source: GAO analysis of OPM Federal Human Capital Survey, 2008.

Low levels of motivation, commitment, and personal empowerment may exacerbate the challenges FCC faces in recruiting and maintaining an experienced staff. For example, stakeholders told us that part of attracting and retaining professional staff is using and valuing their expertise. If expertise is not used or valued, as has occurred in some instances at FCC, then this can have a negative impact on FCC's ability to recruit top candidates in a given professional field. FCC officials told us that in response to the results from the OPM Federal Human Capital Survey, FCC identified leadership and communication skills as areas of focus. To address these needs, FCC has developed an internal Web site that provides a forum for communication and solicitation of information, concerns, and suggestions from staff within FCC. In support of leadership, FCC is working to implement an executive leadership program for existing leaders and an emerging leadership training program to identify potential leaders within FCC and enhance their skills.

### FCC Has Implemented Initiatives to Recruit and Develop Staff and Takes Actions to Determine Expertise Needs, but It Does Not Track Overall Progress Toward Meeting These Needs

FCC has instituted hiring and staff development programs designed to recruit new staff and develop the skills of its existing staff. While these programs are positive steps that can help attract, retain, and train new staff, it is not clear that these efforts are sufficient to address expertise gaps caused by retirements. Specific efforts include the following:

- FCC University was established to provide the resources needed to increase the fluency of commission staff in a number of competency areas. Subject matter experts have been continuously and actively involved in

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defining the training needs and evaluating, designing, and delivering internal courses, and in updating the courses available in the FCC University catalog.

- *Excellence in Engineering Program:* A program that includes both basic and advanced courses in communications technology, a graduate degree program in engineering, and a knowledge-sharing program to increase the exchange of information among staff. The Excellence in Engineering award recognizes engineers, scientists, and other technical staff for outstanding contributions performed in the course of their work at the commission.
- *Excellence in Economic Analysis Program:* A program to ensure staff is fluent in the principles of communication economics. The program consists of ongoing training and development opportunities targeted at, but not limited to, staff economists, economics training for noneconomists, and research tools such as data analysis software. Another component of the program is the Excellence in Economic Analysis Award, which recognizes outstanding contributions to economic analysis at FCC based on the impact of the contribution on FCC policy or its significance for the general base of knowledge in economics or public policy analysis.
- *Engineer in Training Program:* A combined recruitment and accelerated promotion program designed to attract recent engineering graduates and provide them with accelerated promotion opportunities through successful completion of on-the-job training.

FCC has also pursued a variety of strategies to address new expertise needs and human capital challenges. In certain cases, FCC has been able to use direct-hire authority, which streamlines and expedites the typical competitive placement process. FCC was granted direct-hire authority from OPM in response to congressionally-mandated requirements for a national broadband plan. In addition to using direct-hire authority, FCC used appointing authorities, which are outside of the competitive hiring processes, such as Recovery Act appointing authority, temporary consultants, and student appointments, as well as details for staff from other federal agencies to more quickly ramp up its broadband efforts.

FCC also makes multiple efforts to determine the critical skills and competencies that are needed to achieve its mission, including meetings with bureau chiefs, as well as surveys of supervisors and staff. It has set forth occupation-specific competencies for its three key professional areas—engineers, attorneys, and economists. As part of FCC's workforce

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planning efforts, bureau and office chiefs identify, justify, and make their requests for positions, including the type of expertise needed, directly to the chairman's office. According to FCC, the chairman's office considers these requests from a commissionwide perspective, which includes the agency's strategic goals, the chairman's priorities, and other factors such as congressional mandates. The chairman's office communicates the approval of requests directly to the bureau or office chiefs and informs the Office of Managing Director of the decision. Human resources works with bureaus and offices to implement approved hiring.

This process can make it difficult for FCC to develop and implement a long-term workforce plan because workforce needs are driven by short-term priorities and are identified by compartmentalized bureaus rather than by a cohesive long-range plan that considers emerging issues. In addition, an FCC official noted that since FCC is a small agency and expertise needs change quickly, a particular area could be fully staffed with no need for additional hiring, but if two staff leave in a short time period, then an expertise gap could quickly develop and new staff would need to be hired. FCC officials told us that, because of this, they avoid laying out specific targets that might be impossible or undesirable to achieve due to evolving needs. Additionally, FCC officials told us that due to its size and limited hiring opportunities, it is important for the chairman and senior leadership to be able to adjust the goals identified in its Strategic Human Capital Plan.

Without specific targets, FCC cannot monitor and evaluate the agency's progress toward meeting its expertise needs. Previously, we identified several key principles that strategic workforce planning should address,<sup>80</sup> including

- determining the critical skills and competencies that will be needed to achieve current and future programmatic results;
- developing strategies that are tailored to address gaps in the number, deployment, and alignment of human capital approaches for enabling and sustaining the contributions of all critical skills and competencies; and

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<sup>80</sup>GAO, *Human Capital: Key Principles for Effective Strategic Workforce Planning*, [GAO-04-39](#) (Washington, D.C.: December 11, 2003).



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- monitoring and evaluating an agency's progress toward meeting its human capital goals.

Periodic measurement of an agency's progress toward human capital goals provides information for effective oversight by identifying performance shortfalls and appropriate corrective actions. For example, a workforce plan can include measures that indicate whether the agency executed its hiring, training, or retention strategies as intended and achieved the goals for these strategies, and how these initiatives changed the workforce's skills and competencies.

FCC has made efforts to determine the skills and competencies that are needed to achieve programmatic goals and has developed workforce hiring and training strategies. In addition, FCC's current Strategic Human Capital Plan identifies skills and subspecialties needed in the future workforce. However, FCC's Strategic Human Capital Plan does not establish specific targets for these needs or measures for evaluating its progress in meeting these skill needs. FCC officials told us they expect to develop a revised Strategic Human Capital Plan in support of a new FCC Strategic Plan, which they anticipate completing by the end of fiscal year 2010. Additionally, FCC is also in the process of finalizing an OPM-required accountability plan to accompany its Strategic Human Capital Plan. It remains unclear whether FCC's actions are sufficient to ensure that it retains a skilled workforce that can achieve its mission in the future.

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## Conclusions

FCC regulates the telecommunications industry—an industry that is critical to the nation's economy and public safety and that directly affects the ways in which Americans conduct business, socialize, and get their news and entertainment. In recent years, the industry has rapidly evolved, and changing technologies have created new issues that span FCC bureaus and require the expertise of a variety of FCC staff. These changes highlight the need for FCC to ensure that its decisions are fully informed by promoting internal communication and coordination among various bureaus and offices, ensuring commissioner access to staff analyses, effectively collecting public input on its proposed policy changes, and developing methods to ensure it has the staff expertise needed to address these issues. However, we identified several challenges in these areas.

At the bureau and office level, FCC's lack of written procedures for facilitating the flow of information within the agency has in some cases led to ineffective interbureau coordination and allowed prior chairmen to limit internal communication among staff.

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In addition, it is unclear whether the roles of OET and OSP—two offices established to provide independent expertise on complex, crosscutting issues—are clearly defined or are overly subject to a chairman’s preferences. Without written interbureau coordination procedures or clearly defined roles and responsibilities, FCC may be limited in its ability to address crosscutting issues.

At the commission level, the lack of statutory requirements or internal policies on commissioners’ rights and responsibilities during the decision-making process, including their right to bureau and office analysis, has allowed some chairmen to control how and when commissioners receive information from the bureaus and offices. Other independent regulatory agencies have varied in how they address this issue. Ultimately, if commissioners do not have adequate access to information, then the benefits of the commission structure—robust group discourse and informed deliberation and decision making—may be hampered.

In addition, while FCC relies heavily on public input to inform its decisions, we found two primary weaknesses in its processes for collecting that input. First, FCC’s use of NPRMs to pose broad questions without providing actual rule text can limit stakeholders’ ability to determine either what action FCC is considering or what information would be most helpful to FCC when developing a final rule. Second, although FCC has developed rules intended to protect the fairness of *ex parte* proceedings, FCC neither provides detailed guidance on what constitutes a sufficient *ex parte* summary, nor has a process for proactively ensuring that *ex parte* summaries are complete. If parties are able to submit vague *ex parte* summaries that may not fully reflect meetings between FCC officials and outside parties, then stakeholders will continue to question whether commission decisions are being influenced by information that was not subject to public comment or rebuttal and that, in some cases, is submitted just before a commission vote. FCC is currently exploring new methods of collecting public comment and potential revisions to its *ex parte* process.

Finally, at a time when the telecommunications industry has become increasingly complex, a large percentage of FCC’s economists and engineers will be eligible for retirement by 2011, and FCC has faced challenges in recruiting new staff. FCC has taken several positive steps to help meet its workforce needs, including instituting hiring and staff development programs and beginning efforts to identify its current workforce expertise needs. However, continued focus on identifying and instituting additional methods that improve its flexibility to meet its

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expertise needs, and developing measures for tracking its progress toward meeting its needs, will help to ensure that FCC is well-positioned to anticipate and address its current and future workforce and expertise needs.

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## Recommendations for Executive Action

We have identified four areas of concern and are making seven recommendations to address these concerns.

To ensure interbureau coordination on crosscutting issues, we recommend that the Federal Communications Commission (FCC) take the following two actions:

- Develop written policies outlining how and when FCC will
  - identify issues under the jurisdiction of more than one bureau;
  - determine which bureau will serve as the lead on crosscutting issues and outline the responsibilities entailed regarding coordinating with other bureaus; and
  - ensure that staff from separate bureaus and offices can communicate on issues spanning more than one bureau.
- Review whether it needs to redefine the roles and responsibilities of the Office of Engineering and Technology (OET) and the Office of Strategic Planning and Policy Analysis (OSP) and make any needed revisions.

To clarify FCC's policies on providing commissioners access to information from bureaus and offices about agenda items, we recommend FCC take the following two actions:

- Each chairman, at the beginning of his or her term, develop and make publicly available internal policies that outline the extent to which commissioners can access information from the bureaus and offices during the decision-making process, including how commissioners can request and receive information.
- Provide this policy to FCC's congressional oversight committees to aid their oversight efforts.

To improve the transparency and effectiveness of the decision-making process, we recommend that FCC take the following two actions:

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- Where appropriate, include the actual text of proposed rules or rule changes in either a Notice of Proposed Rulemaking or a Further Notice of Proposed Rulemaking before the commission votes on new or modified rules.
  - Revise its *ex parte* policies to include
    - modifying its current guidance to further clarify FCC's criteria for determining what is a sufficient *ex parte* summary and address perceived discrepancies at the commission on this issue;
    - clarifying FCC officials' roles in ensuring the accuracy of *ex parte* summaries and establish a proactive review process of these summaries; and
    - creating a mechanism to ensure all commissioners are promptly notified of substantive filings made on items that are on the Sunshine Agenda.

To improve FCC's workforce planning efforts, we recommend that FCC take the following action:

- In revising its current Strategic Human Capital Plan, include targets that identify the type of workforce expertise needed, strategies for meeting these targets—including methods to more flexibly augment the workforce—and measures for tracking progress toward these targets.

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## Agency Comments

FCC provided written comments, which are reproduced in appendix III. In its comments FCC generally concurred with our recommendations and noted that they have already begun taking steps to address the areas of concern identified in our recommendations. For example, FCC stated that it is in the midst of a review of FCC's existing processes. As part of this process, FCC is reviewing prior procedures for interbureau communication, as well as prior and current practices for commissioner and staff communication. FCC stated that it would identify and incorporate lessons learned and best practices into future internal procedures. FCC did not specifically state whether future policies on commissioner access to bureau and office information during the decision-making process would be made publicly available or provided to FCC's congressional oversight committees. We believe these would be important steps in improving the transparency of FCC's decision-making process. FCC also did not specifically discuss our recommendation that it review

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whether it needs to redefine the roles and responsibilities of OET and OSP and make any needed revisions. Regarding the public comment process, FCC stated that it has worked to include the text of proposed rules in recently issued NPRMs. However, FCC did not state whether this would be an ongoing policy. FCC also noted that the Office of General Counsel is in the midst of reviewing proposals for modifying the current *ex parte* process, and stated that this may lead to a rulemaking to address this issue. Finally, FCC believes that it does not face significant challenges in recruiting top candidates and stated that its unique mission and the influence of its regulatory activities on the communications industry and practices help it attract qualified candidates. However, it concurred that revisions to the current Strategic Human Capital Plan should include targets and measures for tracking progress toward these targets. We recognize FCC's efforts to enhance internal and external communication, to update its comment filing system, and to continue to review other existing processes and workforce planning efforts. However, addressing our specific recommendations will further enhance FCC's efforts to date by promoting internal communication and coordination, clarifying policies on commissioner access to staff analyses, enhancing FCC's methods for collecting public input, and developing methods to ensure it has the staff expertise it needs. In addition, we provided the Federal Energy Regulatory Commission, Federal Trade Commission, and Nuclear Regulatory Commission with a draft of this report for review and comment. They did not offer any comments on our findings or recommendations, but provided technical corrections which we incorporated.

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As agreed with your offices, 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 report. At that time, we will send copies to the Chairman of the Federal Communications Commission and other interested parties. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

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If you have any questions about this report, please contact me at (202) 512-2834 or [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. GAO staff who made major contributions to this report are listed in appendix IV.

A handwritten signature in black ink, appearing to read 'M. Goldstein', with a long horizontal flourish extending to the right.

Mark L. Goldstein  
Director, Physical Infrastructure Issues

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# Appendix I: Objectives, Scope, and Methodology

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The report examines Federal Communications Commission's (FCC) organization, decision-making process, and personnel management. In particular, the report provides information on (1) the extent to which FCC's bureau structure presents challenges for the agency in adapting to an evolving marketplace; (2) the extent to which FCC's decision-making processes present challenges for FCC, and what opportunities, if any, exist for improvement; and (3) the extent to which FCC's personnel management and workforce planning efforts ensure that FCC has the workforce needed to achieve its mission.

To respond to the overall objectives of this report, we interviewed current and former officials from FCC, including former chief economists and chiefs of staff, bureau and office chiefs and acting bureau and office chiefs, commissioners, and chairmen. In addition, we reviewed FCC documents, as well as relevant legislation, federal regulations, and GAO reports on the FCC and areas of focus for this review such as internal controls and workforce planning. We also interviewed industry associations representing broadcast and cable television, public television, consumer electronics, wireless, and telecommunications companies, public interest groups, and other individuals, such as academics with extensive telecommunications experience. Table 3 lists the organizations with whom we spoke.

To describe the challenges FCC's bureau structure presents the agency in adapting to an evolving marketplace, we reviewed FCC's major internal reorganizations since the Telecommunications Act of 1996. We analyzed FCC procedures, applicable laws, and reviewed academic literature on organizational theory and various FCC reform proposals. We also reviewed academic literature on the commission structure, organizational theory, and various FCC reform proposals from a number of stakeholders. We used GAO's internal control and management tool to identify key mechanisms for facilitating the flow of information within an organization.<sup>1</sup>

To determine challenges the commission decision-making process presents for FCC and opportunities for improvement, we reviewed literature on federal rulemaking and potential reforms and on the

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<sup>1</sup>GAO issues standards to provide the overall framework for establishing and maintaining internal control and for identifying and addressing major performance challenges and areas at the greatest risk for fraud, waste, abuse, and mismanagement. See [GAO-01-1008G](#).

commission structure and decision-making process. We reviewed FCC internal decision-making documents and the public comments of current and former FCC commissioners and former chairmen to determine how the decision-making process works. We also interviewed officials from independent regulatory agencies including the Nuclear Regulatory Commission, Federal Energy Regulatory Commission, and the Federal Trade Commission and, where available, reviewed their internal commission procedures to understand how other independent regulatory agencies implement the commission decision-making process. We reviewed FCC's decision-making procedures and public comment and *ex parte* rules, and compared certain aspects to standards established in GAO's internal control standards and other relevant documents. In addition, we interviewed industry, consumer advocate, and regulatory representatives to gain their perspectives on providing information to FCC during the decision-making process and to identify alternative approaches to the decision-making process. Finally, we reviewed FCC documents, policy papers from outside stakeholders, letters to the Presidential Transition Task Team, as well as proposed legislation to determine proposals for altering FCC's public comment process.

To examine whether FCC's personnel management and workforce planning efforts ensure that FCC has the workforce needed to achieve its mission, we reviewed prior GAO products related to strategic workforce planning and human capital challenges. We then reviewed FCC-generated data on overall staff levels, hiring, attrition, and retirement eligibility over the period of 2003 to 2008. We also reviewed FCC's 2007-2011 Strategic Human Capital Plan to determine the challenges FCC has identified for addressing future workforce issues, as well as its proposed solutions. We reviewed FCC's methods for identifying needed skill sets and competencies, including surveys of staff and focus groups. We analyzed results from the Office of Personnel Management's (OPM) Federal Human Capital Survey for 2008 and compared FCC's responses on various items with the responses of the rest of U.S. government staff.

We performed our review from August 2008 to October 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our review objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.



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**Table 3: Organizations Interviewed**

American Cable Association
Association for Maximum Service Television
Association of Public Television Stations
AT&T
Consumer Electronics Association
COMPTEL
Consumers Union
CTIA–The Wireless Association
DIRECTV Satellite Television
Information Economy Project
Levine, Blaszak, Block & Boothby (Telecommunications and Technology Law Firm)
Media Access Project
National Association of Broadcasters
National Association of Regulatory Utility Commissioners
National Association of State Utility Consumer Advocates
National Association of Telecommunications Officers and Advisors
National Cable & Telecommunications Association
National Telecommunications Cooperative Association
Progress and Freedom Foundation
USTelecom–The Broadband Association
Verizon
Wiley Rein, LLP (represents a broad range of telecommunications clients)

Source: GAO.

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# Appendix II: FCC Bureaus and Functions

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FCC staff is organized into seven operating bureaus and 10 staff offices. The bureaus' responsibilities include: processing applications for licenses and other filings; analyzing complaints; conducting investigations; developing and implementing regulatory policies and programs; and taking part in hearings. FCC's offices provide support services for the bureaus and commission.

**Office of Inspector General:** The Office of Inspector General conducts and supervises audits and investigations relating to FCC's operations. The Inspector General reports to the chairman and informs the chair and Congress of fraud or any serious problems with the administration of FCC programs and operations discovered during audits and investigations; reviews and recommends corrective action, where appropriate; and reports on progress made in the implementation of those corrective actions.

**Office of Engineering and Technology:** The Office of Engineering and Technology (OET) advises FCC on engineering matters, manages spectrum, and provides leadership in creating new opportunities for competitive technologies and services for the American public. OET allocates spectrum for nonfederal use and provides expert advice on technical issues before the commission, including helping commissioners understand the tradeoffs of technical issues. In addition to providing technical guidance to the commissioners, FCC's other bureaus rely on OET to provide leadership on high-level technical and engineering issues that do not fall within the scope of a particular bureau and to provide advice on technical issues handled in the bureaus.

**Office of General Counsel:** The Office of General Counsel serves as the chief legal advisor to the commission and to its various bureaus and offices. The General Counsel also represents the commission in litigation in federal courts, recommends decisions in adjudicatory matters before the commission, assists the commission in its decision-making capacity, and performs a variety of legal functions regarding internal and other administrative matters.

**Office of Managing Director:** The Office of Managing Director functions as chief operating official, serving under the direction and supervision of the chairman. The office develops and manages FCC's budget and financial programs, personnel management process and policy, develops and implements agencywide management systems, coordinates the commission meeting schedule, and manages the distribution and publication of official FCC documents.

**Office of Media Relations:** The Office of Media Relations is responsible for the dissemination of information on commission issues. The office is responsible for coordinating media requests for information and interviews on FCC proceedings and activities and for encouraging and facilitating media dissemination of commission announcements, orders, and other information.

**Office of Administrative Law Judges:** The Office of Administrative Law Judges is responsible for conducting the hearings ordered by the commission. The hearing function includes acting on interlocutory requests filed in the proceedings, such as petitions to intervene, petitions to enlarge issues, and contested discovery requests. An administrative law judge, appointed under the Administrative Procedures Act, presides at the hearing during which documents and sworn testimony are received in evidence, and witnesses are cross-examined. At the conclusion of the evidentiary phase of a proceeding, the presiding administrative law judge writes and issues an initial decision which may be appealed to the commission.

**Office of Legislative Affairs:** The Office of Legislative Affairs is the FCC's liaison to Congress and provides lawmakers with information regarding FCC regulatory decisions, answers to policy questions, and assistance with constituent concerns. The office also prepares FCC witnesses for congressional hearings and helps create FCC responses to legislative proposals and congressional inquiries. Additionally, the office is a liaison to other federal agencies, as well as state and local governments.

**Office of Communications and Business Opportunities:** The Office of Communications and Business Opportunities provides advice to the commission on issues and policies concerning opportunities for ownership by small, minority, and women-owned communications businesses. The office works with entrepreneurs, industry, public interest organizations, individuals, and others to provide information about FCC policies, increase ownership and employment opportunities, foster a diversity of voices and viewpoints over the airwaves, and encourage participation in FCC proceedings.

**Office of Workplace Diversity:** The Office of Workplace Diversity advises the commission on all issues related to workforce diversity, affirmative recruitment, and equal employment opportunity.

**Office of Strategic Planning and Policy Analysis:** The Office of Strategic Planning and Policy Analysis (OSP) is responsible for working

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with the chairman, the commissioners, bureaus, and offices to develop a strategic plan identifying short- and long-term policy objectives for the agency. OSP consists of economists, attorneys, and MBAs who serve as expert consultants to the commission in areas of economic, business, and market analysis and other subjects that cut across traditional lines, such as the Internet. The office also reviews legal trends and developments not necessarily related to current FCC proceedings, such as intellectual property law, the Internet, and e-commerce issues.

**International Bureau:** The International Bureau represents the commission in satellite and international matters. This includes advising the chairman and commissioners on matters of international telecommunications policy and the status of the commission's actions to promote the vital interests of the American public in international commerce, national defense, and foreign policy areas. The bureau also develops, recommends, and administers policies, rules, and procedures for the authorization and regulation of international telecommunications facilities and service and domestic and international satellite systems.

**Wireless Telecommunications Bureau:** The Wireless Telecommunications Bureau handles all FCC domestic wireless telecommunications programs and policies—except those involving public safety, satellite communications, or broadcasting—including licensing, enforcement, and regulatory functions. Wireless communications services include cellular telephone, paging, personal communications services, and other commercial and private radio services. The bureau also regulates the use of radio spectrum to fulfill the communications needs of business, aircraft and ship operators, and individuals. The bureau is responsible for implementing the competitive bidding authority for spectrum auctions.

**Enforcement Bureau:** The Enforcement Bureau is responsible for enforcing provisions of the Communications Act of 1934, FCC's rules and orders, and the terms and conditions of station authorizations. Major areas of enforcement that are handled by the Enforcement Bureau are (1) consumer protection enforcement, (2) local competition enforcement, and (3) public safety and homeland security enforcement.

**Consumer and Governmental Affairs Bureau:** The Consumer and Governmental Affairs Bureau (CGB) develops and implements the commission's consumer policies, including disability access. The bureau conducts consumer outreach and education and maintains a Consumer Center that responds to consumer inquiries and complaints. CGB also maintains collaborative partnerships with state, local, and tribal

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governments in areas such as emergency preparedness and implementation of new technologies.

**Media Bureau:** The Media Bureau develops, recommends, and administers the policy and licensing programs relating to electronic media, including cable television, broadcast television, and radio in the United States and its territories. The Media Bureau also handles postlicensing matters regarding direct broadcast satellite service.

**Wireline Competition Bureau:** The Wireline Competition Bureau develops and recommends policy goals, objectives, programs, and plans for the commission on matters concerning wireline telecommunications. The Wireline Competition Bureau's overall objectives include ensuring choice, opportunity, and fairness in the development of wireline telecommunications services and markets; developing deregulatory initiatives; promoting economically efficient investment in wireline telecommunications infrastructure; promoting the development and widespread availability of wireline telecommunications services; and fostering economic growth.

**Public Safety and Homeland Security Bureau:** The Public Safety and Homeland Security Bureau is responsible for developing, recommending, and administering the agency's policies pertaining to public safety communications issues. These policies include 911 and E911, operability and interoperability of public safety communications, communications infrastructure protection and disaster response, and network security and reliability. The bureau also serves as a clearinghouse for public safety communications information and takes the lead on emergency response issues.

# Appendix III: Comments from the Federal Communications Commission



Federal Communications Commission  
Washington, D.C. 20554

December 8, 2009

Mr. Mark Goldstein  
Director, Physical Infrastructure  
U.S. Government Accountability Office  
Washington, DC 20548

Dear Mr. Goldstein:

Thank you for the opportunity to respond to the draft Government Accountability Office (GAO) report concerning the management of the Federal Communications Commission (FCC or Commission).

I am pleased to report that the Commission has already taken substantial, transparent, and measurable steps toward addressing the concerns identified in the GAO recommendations. In one of his first acts after taking office at the Commission, Chairman Genachowski appointed a Special Counsel for FCC reform. In August, at an FCC open meeting the Chairman announced that, in addition to the Special Counsel for reform, our new General Counsel and I would also focus on reform, transparency, and efficiency. We currently are performing a thorough review of the FCC's existing processes and have been making ongoing recommendations for improvement. This review includes:

- A review of our public safety readiness;
- A review of our systems and processes for data collection, analysis and dissemination;
- Improvements in our licensing, comment, and complaint filing systems;
- Modernizing our information infrastructure to ensure the agency functions effectively and efficiently;
- Moving our workforce forward by streamlining our operations, greening the agency, and devising new plans for leadership development and training;
- Improving our institutional processes by better management of workflow, and reviewing our rules and policies to reduce backlogs; and
- Reviewing our financial operations.

In its draft report on the management of the Commission, GAO makes three recommendations. We had begun action in each of these areas even before the GAO prepared its draft report. I address each of these recommendations and actions taken below.

**Inter-Bureau and Office Coordination and Commission Access to Staff Analysis**

First, GAO recommends that the FCC “develop written policies on inter-bureau coordination and Commission access to staff analyses.” As GAO notes, the Commission has at times had various internal written processes and procedures regarding inter-bureau collaboration and communication, most of which are adhered to still to this day. As part of the FCC’s reform agenda, the Special Counsel for FCC reform has been investigating how the Commissioners and staff communicate today, and how communication was accomplished in past Commissions. We will take the lessons learned from that inquiry and incorporate the best practices of the past and the present into the agency’s future internal procedures.

In August, the Commission launched “reboot.fcc.gov” - an internal online forum where employees can submit their ideas for improving and reforming the agency. The Commission’s efforts to improve communications are not just internal, however. Chairman Genachowski is committed to altering how the agency works with the public as well. For instance, the Commission is soliciting public feedback and upgrading our website – one of the main ways in which our agency interacts with the public. We will focus on improving navigation, search capabilities, and the accessibility of information on our site. We will also be launching a section of the reboot.fcc.gov website where citizens can offer their ideas for FCC reform.

The goal is an inclusive process through which the public can be involved in the work of the Commission. The process undertaken for developing the National Broadband Plan already has been and will continue to be the most inclusive in the agency’s history. Since April 2009, the Commission has held more than 30 public workshops; created Blogband, a new FCC blog dedicated to sharing ideas and progress in the development of the Broadband Plan; launched on an innovative “crowd sourcing” platform to generate and encourage public input into policy proposals; developed informational content viewable on YouTube, MySpace and Facebook; issued 25 public notices seeking input on broadband issues; and, as of December 1, had 192,598 followers on Twitter receiving FCC updates on the Broadband Plan.

In addition, the process put into place for developing the National Broadband Plan is a prime example of Chairman Genachowski’s model for inter-bureau and office coordination. The effort to date has involved unprecedented cooperation of almost every Bureau and Office in the Commission, sharing expertise and working closely with the core team dedicated to developing the National Broadband Plan.

These activities provide a model for external communication efforts that will continue to be used well after the Commission delivers the Broadband Plan to Congress in February 2010.

#### ***Ex Parte Reform***

Another part of our communication reform effort involves the notice and comment process along with the *ex parte* policies of the Commission. In its second recommendation, GAO urges the Commission to “revise its notice and comment regulations and its *ex parte* policies.”

With respect to the *ex parte* rules, you correctly note that the Commission's current process can lead to vague or last-minute *ex parte* summaries of meetings held between Commission staff and outside parties. You also note that *ex parte* notices can be filed up until an item is voted by the Commission (even during the Sunshine period that applies prior to the Commission's Open Meetings, if the *ex parte* notice fits into one of the current exceptions), making it difficult for outside parties (and sometimes even Commission staff) to track these notices and respond before an item is voted. Indeed, during the Sunshine period, a party may not respond unless it is invited to do so by Commission staff. We concur in your assessment that the current *ex parte* process should be reviewed and in August, Chairman Genachowski asked the Office of General Counsel to examine whether he should propose to the Commission that we begin a rulemaking proceeding to address some of these issues.

In particular, the Chairman has asked the Office of General Counsel to look at possible proposals regarding how we ensure that *ex parte* summaries accurately and completely reflect what was said in oral *ex parte* meetings; whether we should examine the process by which *ex parte* notices are filed during the Sunshine period at the request of staff; whether we could make better use of electronic filing of *ex parte* notices to increase their availability to Commission staff and outside parties; and also how we might enhance the enforcement of our rules requiring public disclosure of *ex parte* communications.

Our effort won't stop at reforming the *ex parte* process itself. We have already updated our Electronic Comment Filing System (ECFS), which allows consumers to submit, research, and print comments filed with the agency. The system is 10 years old and was in dire need of an upgrade. The improved ECFS is easier to navigate, has greater search capabilities, permits the filing of comments into multiple proceedings with a single submission, and allows filers to learn of new comments matching criteria via RSS feeds, among other enhancements. These changes to ECFS will directly improve an external stakeholder's ability to respond to *ex parte* summaries filed by other interested parties.

With respect to notice and comment rulemakings, GAO states that the "FCC rarely includes the text of the proposed rule in the notice, which may limit the effectiveness of the public comment process." GAO Review at 24. GAO further notes that from 1990 through 2007, only 11.4% of the FCC's NPRMs contained the text of proposed rules. The Commission has worked to improve its record in this area by including the text of proposed rules in all of the recently issued NPRMs. The recent improvements to ECFS, moreover, will allow parties to review comments in the record of FCC proceedings more effectively – and thereby enhance their ability to respond.

In addition, to ensure that the FCC is data-driven in its decision-making, the Chairman directed the FCC's Office of Strategic Planning and Policy Analysis to conduct a top-to-bottom review of the FCC's systems and processes for data collection, processing, analysis, and dissemination. That review was completed on September 24. As the nation's expert agency on communications, the FCC must have access to, and base its decisions on, data that are robust, reliable, and relevant. The review looked at whether



any new data should be collected, whether any existing data reporting requirements should be streamlined or eliminated, and whether existing technological platforms can be modernized to make our use of data more effective and efficient. We expect to report publicly on the findings of the review shortly.

**Strategic Human Capital Planning**

In its third recommendation, GAO states that the Commission should “develop targets identifying expertise needs, strategies for meeting targets, and measures for tracking progress.”

The report states the FCC faces challenges in ensuring it has the expertise needed to adapt to the changing marketplace. It cites as an example the high percentage of staff engineers and economists who are eligible for retirement. It further states that the FCC faces difficulty recruiting top candidates. While agreeing that it is critical that the agency maintain needed expertise for effective decision making, I disagree that the Commission has difficulty recruiting top candidates.

It is true that a significant number of Commission engineers and economists are eligible for retirement. It does not follow, however, that we lack (or will lack) the expertise needed to adapt to a changing marketplace or that we have difficulty recruiting top talent. Attrition is a healthy component of human capital management and provides an organization with the opportunity to infuse the agency with new talent and ensure we have the latest knowledge and thinking regarding technology and science. Putting aside issues faced by all federal agencies, particularly pay scales, the FCC does not have difficulty recruiting top talent. Because of our unique mission and the influence our regulatory activities have on the communications industry and practices, we have traditionally been able to attract large numbers of highly qualified candidates.

Regarding the recommendations, we agree that revisions to our Strategic Human Capital plan should identify targets and the ability to measure those targets. Our current plan identifies workforce expertise and strategies. We will, however, revisit these plans and targets in conjunction with the issuance of a new Commission Strategic Plan in fiscal year 2010.

Specifically, the GAO report recommends that to improve the FCC’s workforce planning efforts, in revising the current strategic human capital plan, the FCC should include:

- Targets that identify the type of workforce expertise needed;
- Strategies for meeting these targets – including methods to more flexibly augment the workforce, and
- Measures for tracking progress towards these targets.

The report further states that without specific targets, the FCC cannot monitor and evaluate the agency’s progress towards meeting its expertise needs.

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**Appendix III: Comments from the Federal  
Communications Commission**

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As GAO recommends in its draft report, the FCC already makes efforts to determine the critical skills and competencies that are needed to achieve its mission and programmatic goals, and has developed workforce hiring and training strategies. Further, the FCC pursues a variety of strategies to address new expertise needs and human capital challenges.

With regard to the example of economist and engineer retirement eligibility, as outlined in our Strategic Human Capital Plan, we identified the high number of economist and engineers eligible to retire and took steps to address this concern. We ramped up engineering recruitment with an emphasis on entry level hiring. As stated in the report, 30 engineers retired during fiscal years 2007 and 2008, and 53 were hired. Of those hired, 43 were at the entry level (GS-7 through 9), six were hired at the mid level (GS-11-13), and four at the top level (GS-14 and 15). As planned, we focused on the entry level hiring, but recognized the need for higher level expertise as well. We identified long term needs, and successfully addressed them in the context of short term conditions. We will continue to monitor and evaluate progress in hiring and human capital management, and, as recommended, will establish appropriate measures to document this activity.

As Chairman Genachowski told Congress recently, revitalizing and retooling the FCC will be a marathon, not a sprint. The Commission has jumped off the starting line with strong strides and we will continue at this pace to establish this agency as the model for excellence in government.

Perhaps most important, we are assembling an extraordinary team of individuals to help with FCC reform and with the many other challenges before us. This team includes top private-sector talent as well as individuals with many years of experience at the FCC, in other parts of government, and in non-profits. Because interdisciplinary collaboration is crucial to the FCC's success, our staff includes individuals from many disciplines. It is also increasingly clear that although the Commission has many experts in traditional fields, we will require additional engineers, technologists, economists and econometricians. To supplement our work in these areas, we have and will continue to look to experts outside the agency to challenge our thinking. This is most evident in our assembly of the team working to deliver the nation's first ever broadband plan to Congress in February 2010.

While we cannot promise instant results, we can assure you of the Commission's commitment to institutionalizing change and to making the FCC a 21st-century agency for the information age – one that fights for consumers and families, and fosters investment and innovation, through fair, participatory, and data-driven processes.

Sincerely,



Steven VanRoekel  
Managing Director

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# Appendix IV: GAO Contact and Staff Acknowledgments

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## GAO Contact

Mark L. Goldstein, (202) 512-2834 or [goldsteinm@gao.gov](mailto:goldsteinm@gao.gov)

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## Staff Acknowledgments

In addition to the contact listed above, Andrew Von Ah (Assistant Director), Eli Albagli, Pedro Almoguera, Thomas Beall, Timothy Bober, Crystal Huggins, Delwen Jones, Aaron Kaminsky, Joshua Ormond, Sarah Veale, and Mindi Weisenbloom made major contributions to this report.

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