

**UNIVERSITY *of* PENNSYLVANIA**  
**JOURNAL *of* LAW & PUBLIC AFFAIRS**

---

Vol. 3

August 2018

No. 2

---

**ARTICLE**

**FCC REORGANIZATION: HOW REPLACING  
SILOS WITH FUNCTIONAL ORGANIZATION  
WOULD ADVANCE CIVIL RIGHTS**

*David Honig\**

**TABLE OF CONTENTS**

INTRODUCTION .....88  
I. HOW THE FCC ADVANCES CIVIL RIGHTS .....88  
II. THE FCC’S ORGANIZATION BY TECHNOLOGY “SILOS” .....92  
III. A THOUGHT EXPERIMENT: FCC REORGANIZATION BY FUNCTION.....99

---

\* David Honig has practiced communications and civil rights law since 1983, specializing in electronic redlining and race discrimination cases, and defining the legal space at the intersection of civil rights and telecommunications law. As co-founder of the Multicultural Media, Telecom and Internet Council and its leader for 28 years, he has represented over 80 national minority, civil rights, and religious organizations before the FCC. The *National Law Journal* has named him one of the 30 most influential communications lawyers. Honig also serves *pro bono* as chief counsel for the Florida State Conference of the NAACP. He holds a B.A. in Mathematics from Oberlin College, an M.S. in Systems Analysis from the University of Rochester, and a J.D. *cum laude* from Georgetown University.

IV. HOW WOULD FCC REORGANIZATION BY FUNCTION IMPACT CIVIL RIGHTS? .....	105
V. THE PATHWAY FROM SILOS TO FUNCTIONAL ORGANIZATION.....	108
CONCLUSION.....	111

## INTRODUCTION

This Article contends that the Federal Communications Commission’s (FCC) structural organization in “silos” that match up with technologies it regulates—media, wireline and wireless—should be replaced with an organization based on functions—policy, economics, licensing, grantmaking, and engineering. To accomplish this, the FCC would create three new bureaus—Policy and Economics, Licensing and Grantmaking, and Engineering—and modestly restructure its Enforcement Bureau.

The silo-based organization of the FCC dated from the 1930’s, and it was appropriate in its time. However, with the growing convergence of technologies, the retention of silo-based organization will lead to inefficiencies, suboptimal regulatory outcomes, and irrationally non-neutral treatment of technological platforms.

A sleeper in this debate is the impact of a potential function-based reorganization of the FCC on its civil rights regulatory responsibilities: equal employment opportunity (EEO), equal transactional opportunity, equal procurement opportunity, and advertising nondiscrimination. This Article describes why a function-based FCC would dramatically improve the FCC’s ability to administer its civil rights management and enforcement duties. With all civil rights functionality centralized and operated with best practices across all technologies, a functionally-structured FCC would be in a position to deliver equal opportunity to all corners of the industries that constitute one-sixth of the economy, that define our democracy and our culture, and that make us who we are as a people.

### I. HOW THE FCC ADVANCES CIVIL RIGHTS

For five decades, the FCC has led the federal government in advancing diversity in the industries it regulates. In 1968, the FCC became the first federal agency to require its licensees to practice nondiscrimination

in employment.<sup>1</sup> Ten years later, in 1978, the Commission became the first federal agency to adopt policies fostering minority ownership of licensed facilities.<sup>2</sup>

These actions were taken by design rather than by accident. The FCC does not regulate widgets—it regulates the most influential industries in the world. Our democracy hinges on the thoughtful FCC oversight of these industries. The framers of the Communications Act of 1934 appreciated this, having created the FCC to regulate “interstate and foreign commerce in communication 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.”<sup>3</sup> Congress in 1996 improved upon that formulation by adding the words “without discrimination on the basis of race, color, religion, national origin, or sex.”<sup>4</sup> Congress has acted favorably, or has not stood in the way, as the FCC developed a broad range of regulations governing equal employment opportunity,<sup>5</sup> equal transactional opportunity,<sup>6</sup> advertising nondiscrimination,<sup>7</sup> and equal procurement opportunity<sup>8</sup>—as well as

---

<sup>1</sup> Nondiscrimination in the Employment Practices of Broadcast Licensees, 13 F.C.C.2d 766 (1968).

<sup>2</sup> Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 (1978).

<sup>3</sup> 47 U.S.C. § 151 (1934).

<sup>4</sup> 47 U.S.C. § 151 (providing language added in the Telecommunications Act of 1996).

<sup>5</sup> See 47 U.S.C. § 334 (discussing the Commission’s equal employment opportunity regulations that apply to television broadcast station licensees and permittees); see also 47 U.S.C. § 554 (stating that Equal opportunity in employment shall be afforded by any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system; see also 47 C.F.R. § 73.881, 47 C.F.R. § 90.168, and 47 C.F.R. § 73.2080 (providing broadcasting equal employment opportunity regulations); (47 C.F.R. § 22.321, 47 C.F.R. § 101.311, 47 C.F.R. § 101.3, and 47 C.F.R. § 101.4 (stating the regulations for common carriers); and 47 C.F.R. §§ 21.920, 47 C.F.R. § 25.601, 47 C.F.R. § 74.996, 47 C.F.R. § 76.71, 47 C.F.R. § 76.73, 47 C.F.R. § 76.75, 47 C.F.R. § 76.77, 47 C.F.R. § 76.79, 47 C.F.R. § 76.1702, 47 C.F.R. § 76.1702, 47 C.F.R. § 76.1802, and 47 C.F.R. § 100.51 (applying equal opportunity regulations to multichannel video program distributors (“MVPDs”))).

<sup>6</sup> 47 C.F.R. § 73.2090 (adopted in U.S. FED. COMM’NS. COMM’N., MB DOCKET NO. 07-294, FCC 16-1, PROMOTING DIVERSIFICATION OF OWNERSHIP IN THE BROADCASTING SERVICES (Nov. 24, 2017) at 55772-3; see also U.S. FED. COMM’NS. COMM’N., 23 FCC Red. 5922, 5939-40, IN THE MATTER OF PROMOTING DIVERSIFICATION OF OWNERSHIP IN THE BROADCAST SERVICES, REPORT AND ORDER AND THIRD NOTICE OF PROPOSED RULEMAKING (2008) [hereinafter *2008 Diversity Order*].

<sup>7</sup> Adopted in the *2008 Diversity Order*, *supra* note 6, at 5941-42 (not subsequently codified in the C.F.R.).

policies designed to foster ownership of media and telecom facilities by minorities and women.<sup>9</sup>

Beginning in 1995, the scope of the FCC's actions has been limited by court decisions holding that such rules and policies must be race-neutral even where there is overwhelming evidence of systemic discrimination.<sup>10</sup> While the FCC brought fourteen employment discrimination cases to trial before administrative law judges in the 1970s,<sup>11</sup> the agency has not brought such a case to trial in the past twenty years, even though racial discrimination in broadcasting has failed to abate and, in some respects, appears to have gotten worse.<sup>12</sup>

At the FCC, the toolbox available to civil rights organizations to fight discrimination contains only two sets of tools:

---

<sup>8</sup> 47 U.S.C. § 554(d)(2)(E) (stating that the FCC must develop rules to ensure that an MVPD shall “encourage minority and female entrepreneurs to conduct business with all parts of its operation”). The rules are found at 47 C.F.R. § 76.75(e).

<sup>9</sup> Some of these policies were short-lived, and their impact was often diluted by policies that pulled in the opposite direction. See David Honig, McGannon Lecture on Communications Practices and Ethics, Fordham University: How the FCC Helped Exclude Minorities from Ownership of the Airwaves (Oct. 2006), <http://mmtconline.org/lp-pdf/DH-McGannon-Lecture-100506.pdf> (discussing broadcast ownership diversity).

<sup>10</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (holding that “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny”); see also *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 352-53 (D.C. Cir. 1998) (holding that the Commission’s broadcast EEO rule was an unconstitutional race-based classification and the rule was subject to strict constitutional scrutiny because it was “built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional [racial] representation” and “oblige[d] stations to grant some degree of preference to minorities in hiring.”); *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13, 21 (D.C. Cir. 2001) (“*MD/DE/DE Broadcasters*”) (providing the rule “under which nonminorities are less likely to receive notification of job openings solely because of their race” is “subject to strict scrutiny”).

<sup>11</sup> See, e.g., *Leflore Broadcasting Co.*, Hearing Designation Order, 36 F.C.C.2d 101 (1972). This extraordinary enforcement record owes much to the leadership of FCC General Counsel and later Commissioner and Chairman Richard Wiley, and Commissioner and later NAACP Executive Director Benjamin Hooks.

<sup>12</sup> See, e.g., U.S. FED. COMM’NS. COMM’N., MM DOCKET NO. 98-204, COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL IN RESPONSE TO THE THIRD REPORT AND ORDER AND FOURTH NOTICE OF PROPOSED RULEMAKING (May 22, 2008) (providing an analysis of Radio-Television News Directors Association (RTNDA) data showing that by 2006, minorities had virtually been purged from English language, non-minority owned radio journalism).

- The first set of tools is race-conscious affirmative action, which the FCC could pursue if it completed the “*Adarand* studies” necessary to satisfy strict scrutiny<sup>13</sup> and met the requirement that it attempt essentially all race-neutral approaches before turning to race-conscious ones.<sup>14</sup>
- The second set of tools is entirely race-neutral: the elimination of archaic regulations that operate as market entry barriers for new entrants such as minority broadcasters. The Multicultural Media, Telecom and Internet Council (MMTC)<sup>15</sup> has become proficient at identifying these entry barriers and persuading the FCC to deregulate them—often in partnership with industry leaders who are equally happy to see the archaic rules go away. A prime example was the FCC’s unanimous 2013 decision to relax restrictions on foreign investment in broadcast licensees<sup>16</sup>—reversing a xenophobic 1912 policy that had foreclosed most access to overseas capital by American broadcasters, including Asian American, Latino and Caribbean American companies. Another example can be found in the FCC’s 2015 decision to authorize certain classes of small, technologically inferior AM stations disproportionately populated by minority owned broadcasters to have top priority in the queues to obtain the FM translators that have become essential to the survival of these AM stations.<sup>17</sup>

---

<sup>13</sup> See *Adarand Constructors*, 515 U.S. at 224 (holding that “all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.”).

<sup>14</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733-35 (2007).

<sup>15</sup> The MMTC was known as the Minority Media and Telecommunications Council from 1986 through 2014.

<sup>16</sup> See Commission Policies and Procedures under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licensees, Declaratory Ruling, 28 FCC Rcd. 16244 (2013).

<sup>17</sup> Revitalization of the AM Radio Service, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd. 12145, 12152 (2015) (“We further direct the Bureau . . . to make the first window available only to applications to modify and/or relocate FM translator stations rebroadcasting Class C and D AM stations. [W]e believe that Class C and D AM stations, because of their lack of limited power or lack of protected nighttime service, will benefit most from the acquisition of a cross service translator, and thus should be afforded the first opportunity to obtain one.”).

But there are limits to the usefulness of these two sets of tools.

First, the FCC has failed to perform the *Adarand* studies despite two court orders manifesting an expectation that the Commission will conduct the studies,<sup>18</sup> and certainly the FCC has not come close to attempting all of the many race-neutral approaches<sup>19</sup> that have been sitting before it for consideration for years.<sup>20</sup> Second, there is only so much that any agency can deregulate, and deregulation is not always beneficial.

Fortunately, a third and powerful set of civil rights tools may be available: *reorganization of the FCC itself*.

## II. THE FCC'S ORGANIZATION BY TECHNOLOGY "SILOS"

Today the FCC contains three major bureaus operating as technology "silos": the Media Bureau, covering radio, television, cable, and direct broadcast satellites;<sup>21</sup> the Wireless Telecommunications Bureau, which handles cellular, paging, personal communications services, public safety, and other commercial and private radio services, as well as competitive bidding for spectrum auctions;<sup>22</sup> and the either optimistically or oxymoronically named Wireline Competition Bureau, which regulates local and long distance common carriers: voice, data, and other telecommunication transmission services.<sup>23</sup> The FCC also houses several function-based bureaus and offices whose jurisdictions cross technological boundaries, including the Office of General Counsel, the Enforcement Bureau and the International Bureau.

The "silo" model of communications industry regulation "views

---

<sup>18</sup> See *Prometheus Radio Project v. FCC*, 652 F.3d 431, 467-68, 471 (3d Cir. 2011) ("*Prometheus II*") (providing that "if the Commission requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor"); see also *Prometheus Radio Project v. FCC*, 824 F.3d 33, 49 (3d Cir. 2016) ("*Prometheus III*") (stating that the Commission "must make a final determination as to whether to adopt a new [eligible entity] definition. If it needs more data to do so, it must get it.").

<sup>19</sup> As is required by *Parents Involved*, *supra* note 14, at 733-35.

<sup>20</sup> See *Prometheus III*, *supra* note 18, at 50 n. 11 (remanding with the understanding that the FCC will consider 17 race-neutral MMTTC proposals); see also *infra* note 71.

<sup>21</sup> See 47 C.F.R. § 0.61 (providing that "the Media Bureau develops, recommends and administers the policy and licensing programs for the regulation of media, including cable television, broadcast television and radio, and satellite services in the United States and its territories").

<sup>22</sup> See 47 C.F.R. § 0.131 (stating that the Bureau is responsible for all spectrum auctions).

<sup>23</sup> See 47 C.F.R. § 0.91 (discussing the Wireline Competition Bureau).

each industry sector as a distinct set of entities that do not interact and which should be regulated under different principles.”<sup>24</sup>

The FCC’s “silo” structure wasn’t planned; it is the product of history. The silo model emulates the Communications Act, which predates most modern telecommunications technology.<sup>25</sup> Thus, the current statute classifies these industries under separate and often anachronistic designations of “media,” “information services” and “telecommunications services.” Yet nowhere in the Telecommunications Act of 1996—much less in the Communications Act of 1934—are there mentions of apps, Operating Systems (OS) providers, handsets, or over-the-top (OTT) content.<sup>26</sup>

What this means is that rules and policies affecting one industry tend to get developed in the bureau charged with regulating that industry—thus virtually ensuring that there will be considerable differences between otherwise-comparable sets of rules and policies governing other industries on the same subject matter.

Throughout the FCC’s first two generations, several distinguished reports recommended extensive reforms in FCC top-line governance and decision-making, while taking for granted or not addressing the silo model for operations and management.<sup>27</sup> More recently, though, as technologies

---

<sup>24</sup> H. Russell Frisby, Jr. & David A. Irwin, *The First Great Telecom Debate of the 21st Century*, 15 COMMLAW CONSPECTUS 373, 379 n. 26 (2007), <http://scholarship.law.edu/commlaw/vol15/iss2/4/>.

<sup>25</sup> Randolph J. May, “*Why Stovepipe Regulation No Longer Works: An Essay on the need for a New Market-Oriented Communications Policy*,” 58 FED. COMM. L. J. 103, 104 (2006), <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1423&context=fclj> (providing “the stovepipes, or vertical ‘silos’ or ‘smokestacks’ as some prefer, refer to the distinct set of regulations that attach to a service offering once it is classified under one definition or the other”).

<sup>26</sup> *Operating System*, COMPUTER HOPE (Apr. 2017), <https://www.computerhope.com/jargon/o/os.htm>. (An OS is software that provides common services for computers and manages computer hardware and software resources. To function properly, a computer program must have an OS. OTT is a term used for the transmitting of audio, video, and other media via the internet without requiring its users to subscribe to a traditional pay service, such as Comcast); Barry Levine, *MarTech Landscape: What is OTT Programming and Why Does It Matter?*, MARTeCH (July 2016), <https://martechtoday.com/marketing-landscape-ott-programming-matter-184073>.

<sup>27</sup> See Harry M. Shooshan, *A Modest Proposal for Restructuring the Federal Communications Commission*, 50 FED. COMM. L.J. 637, 640 (May 1998), [www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1169&context=fclj](http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1169&context=fclj) (recommending replacement of the multimember commission with a single administrator); see also HENRY GELLER, *THE FEDERAL STRUCTURE FOR TELECOMMUNICATIONS POLICY* 21

have converged (such as separate media becoming a single IP network), the silo model has become the subject of extensive criticism.<sup>28</sup> In 2012, Commissioner (now Chairman) Ajit Pai declared that:

Today, the FCC operates under a Communications Act that was last substantially revised in 1996—an Act that divides the communications marketplace into silos of technologies and services. Convergence and competition have rendered this approach hopelessly outdated, as voice, video, and data are quickly becoming just packets of information carried on the same networks. Cable operators offer phone and Internet services. Telecommunications carriers promote video service. Voice over Internet Protocol (or VoIP) providers sell voice service and video conferencing. Companies like Netflix use the Internet to deliver video service. And wireless providers, once known for selling phones the size of a brick,

---

(Benton Foundation ed. 1989) (recommending, *inter alia*, a “Single Executive Branch administrator for telecom policy, housing but not controlling an independent agency to deal with electronic mass media matters”); PRESIDENT’S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK 14 (1971) [hereinafter *Ash Council Report*] (recommending a strong chair but recommending no changes in the agency’s bipartisan, multimember structure and not addressing bureau organization); SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE S. COMM. ON THE JUDICIARY, 86th Cong., REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 65 (Comm. Print 1960) (authored by James M. Landis) [hereinafter *Landis Report*] (recommending a strong chair accountable directly to the President, but not addressing bureau organization); COMM. ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, THE INDEPENDENT REGULATORY COMMISSIONS, *A Report to Congress*, 5-6 (1949) [hereinafter *Hoover Commission Report*], <https://catalog.hathitrust.org/Record/001141813> (recommending a strong executive chairman but not calling into question the underlying multimember commission model or addressing bureau organization).

<sup>28</sup> See, e.g., Richard Adler, Rapporteur, *Rethinking Communications Regulation*, REP. OF THE 27TH ANN. ASPEN INST. CONF. ON COMM. POL’Y v (2013) [hereinafter *Aspen 2013*], <http://csreports.aspeninstitute.org/documents/Rethinking-Communications-Regulation.pdf> (providing that “in a world of converged media and communications, the current American regulatory framework still has silos of regulation that divide communications policy into distinct categories, essentially creating separate regulatory treatment for telephony, broadcasting, cable television, mobile and private communications, not to mention handset vendors, providers of operating systems, apps developers and so-called over-the-top players . . . . As the Internet and other information and communications technologies grow exponentially, and as a new ecosystem is emerging that could conflate previously distinct methods of communication into a single digital medium, questions arise as to whether these silos of regulation are still appropriate.”).



let ever more mobile consumers watch videos, listen to music, play games, and occasionally make a call, all on the go.<sup>29</sup>

A year later, Commissioner Pai “acknowledged that the FCC is ‘hopelessly constrained’ by the existing regulatory silos based on distinctions between media, and that it ‘gets into absurd contortions’ when it attempts to develop sensible regulations given these constraints.”<sup>30</sup> University of Florida economist Mark Jamison has concluded that:

There seems to be a growing consensus that the FCC’s structure<sup>31</sup> is outdated and hinders its work. What should be done? Implement a structure that moves away from antiquated silos—wireline, wireless, and media—to one that reflects the dynamic digital ecosystem and that empowers sound analytical work.<sup>32</sup> Former FCC Chairman Reed Hundt has gone farther, recommending that “[t]he agency should be reorganized forthwith according to functions with industry silos disbanded. No employee should be permitted to remain within a particular functional unit for more than five years.<sup>33</sup>

Some critics of the silo model have been particularly skeptical of the model’s inherent diminishment of the impact of economics in FCC decision-making. Citing the benefits of benefit-cost analysis in evaluation of rules and its endorsement by the Bush I, Clinton, Bush II and Obama administrations,<sup>34</sup> FCC Chief Economist Thomas Hazlett describes how

<sup>29</sup> Ajit Pai, Commissioner, Fed. Comm’n Comm’n, Opening Remarks Before the Internet Transformation Panel of the Communications Liberty and Innovation Project, (Oct. 2012), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-316824A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-316824A1.pdf).

<sup>30</sup> Aspen 2013, *supra* note 12.

<sup>31</sup> *Organizational Charts of the FCC*, FED. COMM’N COMM’N, <https://www.fcc.gov/about-fcc/organizational-charts-fcc> (last accessed Mar. 18, 2018).

<sup>32</sup> Mark Jamison, *Can We Modernize the FCC?* TECH POL’Y DAILY (Feb. 2017), <http://www.techpolicydaily.com/communications/can-modernize-fcc/>.

<sup>33</sup> Reed E. Hundt & Gregory L. Rosston, *Communications Policy for 2006 and Beyond*, 58 FED. COMM. L. J. 1, 33 (2006), [www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1421&context=fclj](http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1421&context=fclj).

<sup>34</sup> Thomas W. Hazlett, *Economic Analysis at the Federal Communications Commission: A Simple Proposal to atone for Past Sins*, Discussion Paper, RESOURCES FOR THE FUTURE 1-2 (April 7, 2011), (available from David Honig) [hereinafter *Hazlett*] (citing Robert W.

economic analysis has helped improve the quality of administrative agency rules.<sup>35</sup> Despite this, he observes that:

[E]conomic analysis, per se, generally enjoys only the support of relatively weak constituencies within the regulatory agency. Agencies have agendas that, loosely stated, are crafted to maximize support for their political benefactors (coalition partners) subject to the constraint the basic constitutional rules are obeyed. The social impacts of keenest interest are reliably communicated by coalition partners. Independent economic analysis of social welfare is neither necessary nor definitive . . . .

The institutional problem is to create new structures, presumably within regulatory agencies, that reduce the free rider problem associated with economic analysis. This can, potentially, be achieved by endowing offices or divisions within agencies with the authority to conduct economic analysis of regulatory choices. Where such offices are controlled by economists, and endowed with immeasurable autonomy and influence, they can help advance the professional priorities of an important set of experts within the regulatory agency.<sup>36</sup>

Hazlett notes that at the FCC there is:

[N]o location anywhere in the organizational structure devoted primarily to economic analysis. This includes 10 offices and seven bureaus. While the Office of Strategic Plans and Policy Analysis (OSP) includes economists, it is primarily staffed by non-economists, has been traditionally headed by a non-economist, and has been reshuffled and renamed by recent FCC Chairman. There is a Chief Economist (CE) at the FCC, academic visitor who serves a short-term (one-year or two-year) appointment made by the

---

Hahn, *Government Analysis of the Benefits and Costs of Regulation*, 12 J. OF ECON. PERSP. 201, 202-3 (1998)).

<sup>35</sup> Hazlett, *supra* note 34, at 4.

<sup>36</sup> *Id.* at 6.

Commission Chair. This position does allow the FCC to receive professional economic advice, but of a very limited sort. Personnel can be assigned to assist the CE on an ad hoc basis, but there is no professional staff dedicated to serve under the direction of the CE. This and the short duration of appointments, mitigate against long-term influence in rule makings that typically take many years to evolve.<sup>37</sup>

To cure these ailments, Hazlett proposes the creation of an Office of Economic Analysis, which would be an “institutional home for economists, well-trained in analytical concepts and highly competent in evaluating welfare changes associated with FCC regulation, to appraise policy issues at the agency and thereby influence agency outcomes. This program will succeed in raising the quality of regulatory decision-making to the degree that such economists are independent and insulated from the conclusions reached by other policy analyst of the agency, and are actively engaged in the process of writing Notices, Rulemakings, Reports and Orders.”<sup>38</sup> Hazlett concludes that:

The basic requirements for creating an Office of Economic Analysis of the FCC is that a critical mass of economic expertise be assembled in one location; that the office be directed by the economist of high rank and authority within the agency; that the office be given latitude to select research teams relevant study projects, and to thereby acquire deep knowledge of relevant markets and policies; that the staff professionals be active in scholarly research; and that this sophisticated analytical base productively participates in FCC policymaking. This latter, most important, condition requires ready access to the FCC chair, to other commissioners, and the bureau chiefs outside of [the Office of Economic Analysis].<sup>39</sup>

---

<sup>37</sup> *Id.* at 7-8.

<sup>38</sup> *Id.* at 16 (noting that his proposal “leans heavily on the 2004-05 proposal of Martin Perry”)

<sup>39</sup> *Id.* at 19-20.

In its proposal for the creation of a Bureau of Policy and Economics,<sup>40</sup> this article draws heavily on Hazlett's approach.

When considering the break-up of silos, it is important to recognize that silos are not entirely foreign to one another. Nor could they be; nearly all of the FCC's 1,688 employees<sup>41</sup> work in the same eight-story building, and they share a nearby cafeteria. The Commission's organization by silos does not mean that all decisions reflecting one bureau's technology-specific body of law are always at odds with decisions reflecting other bureaus' technology-specific bodies of law. It is not uncommon for the agency to create cross-bureau task forces of senior staff.<sup>42</sup> Staff of the Media, Wireless and Wireline bureaus often coordinate with one another to avoid inconsistent results, and the commissioners are sensitive to avoiding inconsistent or "platform skewed" outcomes. Nonetheless, all of this inter-bureau coordination takes effort, and at best it is a partial and incomplete workaround of silo design. Thus it often fails to produce platform-neutral outcomes.

The Commission has not been inattentive to the need to reorganize by function and to graduate from the silo paradigm. In recent years, even while operating within the constraints of its current structure, the Commission has extended regulatory parity to multiple contexts, including prohibiting exclusivity contracts in video and telecommunications services in residential multiple tenant environments<sup>43</sup> and, pursuant to Sections

---

<sup>40</sup> See *id.* at 11-13 (discussing the proposal).

<sup>41</sup> *Employee Profile at the FCC*, FED. COMM'N COMM'N, <https://www.fcc.gov/general/employee-profile-fcc#block-menu-block-4> (last accessed Mar. 18, 2018).

<sup>42</sup> Two examples: in 2002, the FCC formed the Spectrum Policy Task Force, which was composed of senior staff from several Commission bureaus and offices. *FCC Chairman Michael K. Powell Announces Formation of Spectrum Policy Task Force*, FCC News Release (June 6, 2002), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-223142A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-223142A1.pdf). In 2012, the FCC formed the Incentive Auction Task Force with staff of most Commission bureaus and offices "to deploy market forces and a market-based mechanism to repurpose spectrum for flexible use, including mobile broadband" in order to manage the most complex auction in history. Statement of FCC Chairman Julius Genachowski on the Incentive Auction Task Force (Mar. 21, 2012), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-313140A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-313140A1.pdf).

<sup>43</sup> See *Promotion of Competitive Networks in Local Telecommunications Markets (Report and Order)*, 23 FCC Rcd 5385, 5387 ¶5 (2008) ("[I]n an environment of increasingly competitive bundled service offerings, the importance of regulatory parity is particularly compelling in our determination to remove this impediment to fair competition.").

338(a) and 338(j) of the Communications Act,<sup>44</sup> establishing comparability in the cable and satellite carriage of digital-only stations.<sup>45</sup> Most recently, the Commission eliminated the correspondence file and principal headend public file requirements in order to lessen the regulatory requirements imposed on commercial broadcasters and cable operators, thus advancing regulatory parity with respect to public file requirements among program distributors.<sup>46</sup> The Commission noted that eliminating the correspondence file affords commercial broadcasters the same opportunity as other entities with online file requirements to provide online access to all public files, thus advancing regulatory parity.<sup>47</sup>

### III. A THOUGHT EXPERIMENT: FCC REORGANIZATION BY FUNCTION

Let us suppose the FCC were reorganized entirely by function—meaning that the Media, Wireless and Wireline bureaus would be closed; three new bureaus—Policy and Economics, Licensing and Grantmaking, and Engineering, would be created; and an existing bureau, Enforcement, would be given additional functions. The Public Safety and Homeland Security Bureau, the Office of General Counsel, the International Bureau, and other offices would be unchanged.

In assigning the Media, Wireless, and Wireline bureaus' functions to other bureaus, the agency would essentially be transitioning from a model in which the three technology silo-based bureaus were producing their "products" (rules, licenses, and sanctions) in three separate product lines (media, wireless, and wireline) to a new model in which bureaus of Policy and Economics, Licensing and Grantmaking, Engineering, and Enforcement would each be producing separate but essential elements of these products, but across *all* product lines.

A new bureau of Licensing and Grantmaking would have at its only purposes the issuance of licenses by granting routine applications or

---

<sup>44</sup> 47 U.S.C. §§ 338(a) and 338(j).

<sup>45</sup> See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues, 47 C.F.R. ¶76 (2008) ("The Commission has required carriage of digital-only stations by cable operators, and a similar requirement is both appropriate and comparable for satellite carriers.").

<sup>46</sup> Revisions to Public Inspection File Requirements – Broadcast Correspondence File and Cable Principal Headend Location, 47 C.F.R. ¶73, 76 (2017).

<sup>47</sup> *Id.*

through the administration of auctions; and administering the Universal Service Fund (USF). These functions are classic “giving away stuff.” On its face, this function does not belong in the same place as policy, economics or, especially, enforcement.<sup>48</sup> Further, to ensure platform neutrality, “giving away stuff” across technologies certainly belongs in the same place.

Perhaps the most consequential outcome of reorganization of the Commission by function would be the consolidation and elevation of economic analysis into a Bureau of Policy and Economics. Heightening the role of economic analysis in FCC decision-making has been a major theme of the Pai administration.<sup>49</sup> In April 2017, Chairman Pai specifically addressed the inefficiencies attendant to the deployment of economics in silo-based bureaus:<sup>50</sup>

[E]conomists work in siloes. This impedes their productivity and impairs agency efficiency. For example, at any given time, economists in one Bureau can be quite busy. But economists in another Bureau might not have much work. In a converged marketplace, economists with expertise in one context may be able to contribute significantly to addressing problems in another. There can be great benefit from this cross-fertilization of ideas. And our economists are capable of pinch-hitting if needed in areas outside their specialty. The FCC has many talented economists scattered across the agency, and I believe there is great benefit to creating a place where economists can work together on a greater variety of issues.

Now let’s put the FCC’s structure in context. Look across government at comparable agencies that handle competition and consumer protection issues. The FTC’s Bureau of Economics has nearly 80 Ph.D.-level economists. The Justice

---

<sup>48</sup> See 47 C.F.R. §§ 0.91 *infra* note 67 for more information on categories of functions.

<sup>49</sup> Mark Jamison, *Will Chairman Pai resurrect economics at the FCC?*, AEI (Apr. 6, 2017), <http://www.techpolicydaily.com/communications/will-chairman-pai-resurrect-economics-fcc/>. Dr. Jamison’s article reports on an address Chairman Pai delivered at the Hudson Institute, Ajit Pai, Chairman, Fed. Comm. Comm’n, Remarks at the Hudson Institute: The Importance of Economic Analysis at the FCC (Apr. 5, 2017) in which the Chairman announced that he intends to create an Office of Economics and Data as a first step toward elevating the role of economics in FCC regulation.

<sup>50</sup> *Id.*

Department's Antitrust Division employs an Economic Analysis group. The Securities and Exchange Commission has a Division of Economic and Risk Analysis. Each office is integrated into policy-making across their agencies or divisions. We don't do this at the FCC.

Indeed, Chairman Pai has already begun the task of upgrading economic analysis within the FCC's operating structure. In January 2018, the Chairman, joined by two of the other four commissioners, issued an Order creating the Office of Economics and Analytics ("OEA"), which will:

- (A) provide economic analysis, including cost-benefit analysis for rulemakings, transactions, adjudications, and other Commission actions;
- (B) manage the FCC's auctions in support of and in coordination with FCC Bureaus and Offices;
- (C) develop policies and strategies to help manage the FCC's data resources and establish best practices for data use throughout the FCC in coordination with FCC Bureaus and Offices; and
- (D) conduct long-term research on ways to improve the Commission's policies and processes in each of these areas.<sup>51</sup>

Chairman Pai sees the OEA as a vehicle "to make sure economics does in fact play a larger role at the FCC."<sup>52</sup>

Operationalizing Chairman Pai's dream and extending it into an element of a full replacement of the silos model, here is what three new bureaus and one restructured bureau might look like after the FCC is transitioned to an entirely function-based structure:

#### Bureau of Policy and Economics

- Conducting and coordinating policy research and development that is presently done in-house by and for

---

<sup>51</sup> U.S. FED. COMM. COMM'N., FCC 18-7, IN THE MATTER OF ESTABLISHMENT OF THE OFFICE OF ECONOMICS AND ANALYTICS, 1 (Jan. 30, 2018).

<sup>52</sup> *Id.* at 10 (Statement of Chairman Ajit Pai).

the Office of Strategic Planning and Policy Analysis (OSP);<sup>53</sup>

- Conducting policy research and development that's currently performed by OSP for other staff units, as well as rulemaking proceedings and research currently performed by the Media, Wireline, and Wireless Bureaus;<sup>54</sup>
- Making policy recommendations for the Commission directly, including responsibilities currently performed by OSP, the Wireline Bureau, and the Wireless Bureau.<sup>55</sup>

#### Bureau of Licensing and Grantmaking

- Issuing licenses and authorizations;<sup>56</sup>
- Conducting auctions;<sup>57</sup>
- Administering the Universal Service Fund.<sup>58</sup>

#### Engineering Bureau

- Conducting engineering research and administration that's presently done in-house by and for the Office of Engineering and Technology (OET);<sup>59</sup>
- Conducting pure and theoretical engineering research, including that presently being performed by OET;<sup>60</sup>
- Assisting other bureaus and offices, including the Media, Wireline, and Wireless Bureaus, with engineering issues and research, including that currently performed by OET;<sup>61</sup>
- Representing the Commission at international conferences and with international coordination,

<sup>53</sup> 47 C.F.R. § 0.21(a), (e), (g), (h), (i).

<sup>54</sup> 47 C.F.R. §§ 0.21(b) and (j) (OSP); 47 C.F.R. § 0.61(b), (c) and (g) (Media Bureau); 47 C.F.R. §§ 0.91(e), (f), (g), (h), (i), and (l) (Wireline Bureau); 47 C.F.R. § 0.131(e), (f), (g),

<sup>55</sup> 47 C.F.R. §§ 0.21(c), (d) and (f) (OSP); 47 C.F.R. § 0.91(a) (Wireline Bureau) 47 C.F.R. § 0.131(a) (policy and rulemaking functions); §0.131(b) (Wireless Bureau).

<sup>56</sup> 47 C.F.R. § 0.61(a) (Media Bureau); 47 C.F.R. §§0.131(a) (licensing functions); (j) (m), (n), (p), and (s) (Wireless Bureau).

<sup>57</sup> 47 C.F.R. § 0.131(c) (Wireless Bureau).

<sup>58</sup> 47 C.F.R. §§ 0.91 (n), (p) (Wireline Bureau); 47 C.F.R. § 0.131(r) (Wireless Bureau).

<sup>59</sup> 47 C.F.R. §§ 0.31(i), (j), (l), and (m) (OET).

<sup>60</sup> 47 C.F.R. §§ 0.31(c) and (e).

<sup>61</sup> 47 C.F.R. §§ 0.31(a), (g), (h), and (n).



including current OET and Wireless Bureau assignments;<sup>62</sup>

- Advising the Commission directly on engineering matters, including current OET responsibilities.<sup>63</sup>

#### Enforcement Bureau<sup>64</sup>

- Perform all current enforcement duties across all technologies;<sup>65</sup>
- Assume enforcement responsibilities currently held by the Media Bureau, such as broadcast and MVPD EEO, political broadcasting, and SHVIA, the Wireline Bureau such as those relating to license transfers, terminal attachments, and public safety, and the Wireless Bureau such as regulation of charges, practices, classifications, terms and conditions and facilities;<sup>66</sup>

---

<sup>62</sup> 47 C.F.R. §§ 0.31(b) and (k) (OET); 47 C.F.R. § 0.131(h) and (k) (Wireless Bureau).

<sup>63</sup> 47 C.F.R. §§ 0.31(d) and (f).

<sup>64</sup> There would be a need for coordination between the Enforcement Bureau and the Licensing and Grantmaking Bureau when a licensee's basic qualifications are at issue, raising the question of whether an applicant for a license or grant is qualified. *See, inter alia*, 47 U.S.C. § 309(e) (providing designation for hearing on broadcast license applications); *Universal Service Fund*, FCC, available at <https://www.fcc.gov/general/universal-service-fund>,

(“The Telecommunications Act of 1996 expanded the traditional definition of universal service—affordable, nationwide telephone service to include among other things rural health care providers and eligible schools and libraries. Today, the FCC provides universal service support through four mechanisms: (1) High Support Mechanism provides support to certain qualifying telephone companies that serve high cost areas; (2) Low Income Support Mechanism assists low-income customers; (3) Rural Health Care Support Mechanism allows rural health care providers to pay rates for telecommunications services similar to those of their urban counterparts, making telehealth services affordable; and (4) Schools and Libraries Support Mechanism, popularly known as the ‘E-Rate,’ provides telecommunications services, Internet access, and internal connections to eligible schools and libraries.”).

<sup>65</sup> 47 C.F.R. § 0.111 (Enforcement Bureau).

<sup>66</sup> *See* 47 C.F.R. §§ 0.61(d) (Media Bureau, EEO), 0.61(e) (providing political programming and related matters), and 0.61(f) (providing miscellaneous broadcast and cable matters such as video access to persons with disabilities and Satellite Home Viewer Improvement Act (SHVIA)); 47 C.F.R. §§ 0.91(d) (providing license transfers and discontinuance of service), § 0.91(j) (providing terminal attachments), and § 0.91(o) (public safety); § 0.131(d) (providing Wireless Bureau – charges, practices, classifications, terms and conditions, and facilities).

- Administer functions more closely related to enforcement than to policy that are presently handled by the Media, Wireline or Wireline Bureaus.<sup>67</sup>

This arrangement has four advantages over the current state of affairs:

First, it would enhance efficiency by baking in platform neutrality. Each technology would receive the same regulatory presumptions, standards and benefits that other technologies receive—thus incentivizing innovation and investment and reducing appellate litigation risks to the agency.

Second, it would incorporate into the organizational chart the lines of communication that currently have to be created artificially through cross-bureau task forces or, worse yet, through random communications among bureaus.<sup>68</sup>

---

<sup>67</sup> Media Bureau ancillary functions include acting on “applications for authorization, petitions for special relief, petitions to deny, waiver requests, requests for certification, objections, complaints, and requests for declaratory rulings and stays” in 47 C.F.R. § 0.61(h); as well as § 0.61(i) (discussing consumer complaints), § 0.61(j) (discussing subpoenas), § 0.61(l) (providing public safety, this section is used to authorize waivers of broadcast station power restrictions in emergencies), and § 0.61(k) (offering an all functions except reserved provision). For Wireline Bureau ancillary functions, see 47 C.F.R. §§ 0.91(b) (providing requests for interpretation or waiver of rules), § 0.91(k) (providing consumer complaints, and § 0.91(m) (offering an all functions except reserved provision). For Wireless Bureau ancillary functions, see 47 C.F.R. §§ 0.131(i) (providing consumer complaints), § 0.131(o) (discussing subpoenas), and § 0.131(q) (discussing public safety).

<sup>68</sup> This issue of cross-bureau relationships, and the broader issue of inter-agency relationships, may have persuaded the Chairman to scale back a September 2017 internal trial balloon plan to create a Bureau of Economics and Data and, instead, create in January 2018 the Office of Economics and Analytics (OED). In a posting on the Technology Policy Institute blog, former FCC chief economist (in 2014) Tim Brennan stated that “a separate bureau” could produce “a ‘Siberia’ effect: Pitting economists into a single place makes them easier to ignore . . . some staff economists have expressed concerns that segregating economists into a separate office will inhibit valuable collaborations with technologists and lawyers.” Further, Brennan contended having a bureau of economics does not ensure that economists will have “a seat at the table when the FCC makes decisions.” See Tim Brennan, *Bolstering Economics at the FCC: Will a Separate Office Help?*, TECH. POLICY INST. (Sept. 18, 2017), available at <https://techpolicyinstitute.org/2017/09/18/bolstering-economics-at-the-fcc-will-a-separate-office-help/>. The combination of economics and policy in the same bureau, as proposed herein, might resolve the “Siberia” and related governance issues.

Third, decision-making would automatically adjust to changes in technology. Although media and telecom technologies change rapidly and unexpectedly, the laws of economics, policy and engineering are immutable. Thus the new structure would accommodate future technological evolution.

Fourth, it would naturally centralize similar functions in their logical sites, with subject matter experts efficiently applying best practices across all industries, to the great benefit of consumers, the underserved, and the taxpayers. An especially salutary example of how this would happen can be found in civil rights regulation, which is detailed in the following section of this article.

#### **IV. HOW WOULD FCC REORGANIZATION BY FUNCTION IMPACT CIVIL RIGHTS?**

One of the great advantages of function-based organization of the FCC is that it would vastly improve the agency's ability to advance the goal of full inclusion of minorities and women in the nation's most influential industries. Under a functional structure, the FCC would naturally combine all of its civil rights enforcement offices—across sector-specific rules and across multiple technologies—in the Enforcement Bureau.<sup>69</sup> Such an office would apply, to civil rights, the FCC's longstanding stated goals of regulatory parity and platform neutrality—the principles that hold that all technologies are regulated in the same way unless there are defensible reasons for regulating them differently. Thus, the Bureau of Policy and Economics would handle all civil rights policymaking.<sup>70</sup>

---

<sup>69</sup> The FCC is considering MMTC's proposal to transfer broadcast and MVPD EEO enforcement from the Media Bureau to the Enforcement Bureau. *See* U.S. FED. COMM. COMM'N., MB DOCKET NO. 14-50, FCC 16-107, IN THE MATTER OF 2014 QUADRENNIAL REGULATORY REVIEW, 144 (Aug. 10, 2016) (acknowledging that "enforcement of the Media Bureau Equal Employment Opportunity rules, which is presently handled by the Media Bureau, might be more appropriate as a function of the Enforcement Bureau, given the Enforcement Bureau's existing mission and expertise in the enforcement of the Commission's regulations" and directing several bureaus and offices "to discuss the feasibility, implications, and logistics of shifting the enforcement of the Media Bureau Equal Employment Opportunity rules from the Media Bureau to the Enforcement Bureau.").

<sup>70</sup> It is well established that an instrumentality established to "promote" a technology is inherently conflicted when also charged with enforcing proscriptive regulations against licensees using that technology. A classic example is the 1974 re-establishment the National Transportation Safety Board as a separate entity outside of the Department of

This means that the best practices of each element of civil rights regulation would be implemented across the board for all technologies. For example, the highly successful cable and MVPD equal procurement opportunity rule—which requires the dissemination of requests for proposals (RFPs) broadly enough to reach all qualified contractors, including those owned by minorities and women, would be extended to all technologies.<sup>71</sup>

The advertising nondiscrimination rule and the transactional nondiscrimination rule each apply exclusively to broadcasting only because the dockets giving birth to them in 2008 just happened to be broadcast (“MB” or “Media Bureau”) dockets.<sup>72</sup> But there is no logical reason why these rules should not apply to other technologies. Under function-based regulation, they would almost automatically apply to all technologies.

The grandmother of them all—EEO regulation—does apply across all technologies, but the underlying rules and precedents are different for each industry.<sup>73</sup> The reasons for this patchwork of regulations go back 40 years, to a time when the labor pools for the various regulated industries

---

Transportation, thus enabling the NTSB to perform its investigative functions independently. See History of the National Transportation Safety Board, NAT’L TRANSP. SAFETY BD., available at <https://www.nts.gov/about/history/Pages/default.aspx> (discussing the NTSB’s independence). Presently FCC broadcast and MVPD EEO regulation is performed by the Media Bureau rather than the Enforcement Bureau. This anomaly would be corrected naturally if the silo-based FCC structure were replaced with a functional structure. In such event, broadcast and MVPD EEO enforcement would logically find its way over to the Enforcement Bureau.

<sup>71</sup> Erroneously claiming that it was outside the scope of the media ownership proceeding, the Commission in 2014 failed to adopt a proposal by MMTC—backed by 57 national civil rights organizations—to extend the cable and MVPD procurement rule to all regulated communications technologies. See U.S. FED. COMM. COMM’N *supra* note 69. In 2016, the Third Circuit of the U.S. Court of Appeals accepted the FCC’s word that, on remand, the FCC would consider the procurement proposal at least as it related to the broadcasting industry. See *Prometheus Radio Project v. Fed. Comm. Comm’n*, 824 F.3d 33, 50 (3d Cir. 2016). When the FCC *again* failed to do so, the MMTC and the National Association of Black Owned Broadcasters (NABOB) petitioned for review once again. *MMTC and NABOB v. FCC*, No. 18-1670 (3d Cir., Apr. 5, 2018).

<sup>72</sup> U.S. FED. COMM. COMM’N., MB DOCKET NO. 07-294, IN THE MATTER OF PROMOTING DIVERSIFICATION AND OWNERSHIP (June 16, 2008).

<sup>73</sup> Differences among the rules include the number of recruitment initiatives a reporting unit must engage in, different time periods for when these recruitment initiatives must occur, religious affiliation requirements, and the implementation of reporting requirements. Compare, e.g., 47 C.F.R. § 73.2080(c)(1) and (2) (discussing broadcasting) with 47 C.F.R. § 76.75(b)(1) and (2), and with §§ 76.77 (discussing cable). If there is a logical reason for the differences in these regulations, it is not immediately apparent.

seldom significantly overlapped. Today, however, the labor pools of most FCC-regulated industries have largely converged—a fact the FCC recognized as far back as 1999.<sup>74</sup>

The proposed reorganization of the FCC by functions rather than silos would produce civil rights regulation that would be a vast improvement on the current regulatory piecemeal quilt:

- The rules would be consistent across platforms, and thus more equitable than the current rules.
- The rules would be administered by a single office populated by a core staff of subject matter experts, using best practices drawn from all technologies. Thus they would be more cost-effective, more efficient, and more responsive to the needs being addressed by today's patchwork of rules.
- Since the rules would apply across all platforms, they would provide greater coverage and extend current successful regulations throughout all of the industries touched by the FCC.

Industry leaders, including all of the major trade associations, have not opposed extension of these rules across the board.<sup>75</sup> They recognize that bad actors drag down their industries, and that diversity improves companies' bottom lines.<sup>76</sup> They also recognize that diversity promotes

---

<sup>74</sup> See *A New Federal Communications Commission for the 21st Century*, FCC, 4 (1999), available at <https://transition.fcc.gov/Reports/fcc21.pdf>, (“Convergence across communications industries is already taking place, and is likely to accelerate as competition develops further. Thus, in addition to refocusing our resources on our core functions for a world of fully competitive communications markets, the FCC must also assess, with the help of Congress and others, how to streamline and consolidate our policymaking functions for a future where convergence has blurred traditional regulatory definitions and jurisdictional boundaries.”).

<sup>75</sup> No one, including representatives of the broadcasting industry, opposed the FCC's 2008 adoption of the broadcast advertising nondiscrimination rule and the broadcast transactional nondiscrimination rule; and no one opposed the 2014 extension of the cable and MVPD procurement rule to other technologies.

<sup>76</sup> The social science data overwhelmingly demonstrates that diverse companies perform better for their shareholders and for consumers. See, e.g., *Why Diversity Matters*, CATALYST, 3 (July 2013), [http://www.catalyst.org/system/files/why\\_diversity\\_matters\\_catalyst\\_0.pdf](http://www.catalyst.org/system/files/why_diversity_matters_catalyst_0.pdf) (reporting that

competition, as Commissioner Martin famously explained in approving new broadcast EEO rules in 2002 in the wake of *MD/DC/DE Broadcasters*:

By choosing candidates from a larger, more diverse pool, broadcasters and MVPDs will be better able to find the most qualified candidates. A more talented workforce leads to improved programming, which ultimately benefits all consumers. The program we adopt today therefore should promote not just diversity, but also true competition.<sup>77</sup>

## V. THE PATHWAY FROM SILOS TO FUNCTIONAL ORGANIZATION

Reorganization of the FCC is achievable but not without challenges. Any reorganization of this magnitude would, unavoidably be somewhat disruptive in the short run. The FCC would become dysfunctional for at least a few weeks while it is recuperating, but that is the least of our worries. There are many reasons why the FCC has resisted structural reform for decades.

Ever since the Communications Act of 1934 combined the telephone and telegraph regulatory functions previously handled by the Department of Commerce and the Interstate Commerce Commission with the radio regulatory functions previously handled by the Federal Radio Commission,<sup>78</sup> media and telecom legislation has been organized by silos.

---

“[a] study that focused on 151 firms on the Australian Securities Exchange found that women had a positive impact on economic growth and social responsiveness. Firms with two or more women board directors had higher returns on equity, higher market-to-book value (M/B), and improved corporate sustainability via higher social responsiveness,” and, “Catalyst’s 2004 research found that companies with the highest representation of women in senior leadership had 35 percent higher return on equity and 34 percent higher total return to shareholders”; see also Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOCIOLOGICAL R. 208 (2009) (finding that a racially diverse workforce was positively correlated with more customers, increased sales revenue, greater relative profits, and greater market share, and gender diversity is positively associated with increased sales revenue, more customers, and greater relative profits).

<sup>77</sup> U.S. FED. COMM. COMM’N., MM DOCKET NO. 98-204, FCC 02-303, IN THE MATTER OF REVIEW OF THE COMMISSION’S BROADCAST AND CABLE EQUAL EMPLOYMENT OPPORTUNITY RULES AND POLICIES (Nov. 7, 2002).

<sup>78</sup> STUART MINOR BENJAMIN & JAMES B. SPETA, TELECOMM. L. & POLICY, 52-53 (2nd ed. 2006).

This legislation has translated itself into silo-based FCC operating units.<sup>79</sup> There are reasons why silo-based regulation has persisted for so many decades.

Perhaps the greatest hurdle to overcome in a transition from silos to functions is the unavoidable skepticism of established incumbent companies that are accustomed to the predictability and performance of “their” silos. Silo-based lawmaking has worked well for some of the regulated industries, which have enjoyed the opportunity to have “their” bureau (Media, Wireless or Wireline) issue “products” (licenses and rules) that facilitate business in the markets in which they operate, irrespective of whether the rules differ from those emanating from competing industries’ bureaus. A shift to function-based bureaus would produce platform-neutrality, but inevitably that means that someone’s platform-advantage becomes less advantaged for themselves, even if it advances equality, free speech (and more speech), and competition for the public.

Nothing in the Communications Act prevents the Chairman of the FCC from reorganizing the agency on his own. But as a practical matter, anything as consequential as a major reorganization would need to be performed by, or be closely supervised by Congress, which holds the agency’s purse strings. As this is written, the FCC and most other parts of the federal government are under a hiring freeze. A new function-based structure would probably require about the same number of personnel as the current silo-based structure, but relatively more economists. Thus, the FCC Chairman would need the cooperation of Congress to be sure the new structure is fully staffed with the skill sets he needs.

There is another reason why the FCC Chairman would be well advised to rely on Congress to take the lead and act in a bipartisan way to effectuate a transition from a silo-based to function-based FCC structure. Over the past two decades, the FCC itself has come to be regarded as highly partisan, perhaps even more so than today’s Congress. Thus there will be resistance to restructuring the agency if the administration is perceived as using the reorganization process to achieve unrelated deregulatory objectives that could not be achieved as easily on their own. Those who disagree with the administration’s policy directions might reasonably fear that any major reorganization of the FCC could be used—even unintentionally—for the diminishment or downgrading of staff units that study, administer, or enforce policy priorities with which the administration

---

<sup>79</sup>*Id.* at 53-54.

disagrees, such as Title II internet regulation<sup>80</sup> or enforcement of the media structural ownership rules.<sup>81</sup> The same fears would attach in reverse if a reorganization of the agency were administered after 2020, when members of the party not currently in power might lead the FCC.

In light of these entirely foreseeable political considerations, a congressional task force focused on efficiency and cost-saving, with the gravitas of the Landis, Ash, or Hoover Commissions,<sup>82</sup> would need to

---

<sup>80</sup> See *FCC Proposes Ending Utility-Style Regulation Of The Internet*, FCC NEWS (May 18, 2017), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0518/DOC-344948A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0518/DOC-344948A1.pdf).

<sup>81</sup> See U.S. FED. COMM. COMM'N., MB DOCKET NO. 14-50, FCC 14-28, IN THE MATTER OF 2014 QUADRENNIAL REGULATORY REVIEW – REVIEW OF THE COMMISSION'S BROADCAST OWNERSHIP RULES AND OTHER RULES ADOPTED PURSUANT TO SECTION 202 OF THE TELECOMMUNICATIONS ACT OF 1996 (Mar. 31, 2014) (subsequent history omitted). On the other hand, no one should fear that the Commission would use reorganization to undercut the natural enhancement of civil rights enforcement that would naturally attend the replacement of a silo-based structure with a functional structure. To be sure, it appears that several federal agencies and departments' civil rights enforcement programs are undergoing severe cutbacks in their budgets or reversals of their substantive focus. See Letter of the Leadership Conference on Civil and Human Rights and 99 Organizations to President Donald J. Trump, (June 5, 2017), [http://www.civilrights.org/advocacy/letters/2017/coalition\\_letter\\_civil\\_rights\\_enforcement.html](http://www.civilrights.org/advocacy/letters/2017/coalition_letter_civil_rights_enforcement.html); Juliet Eilperin et. al, *Trump administration plans to minimize civil rights efforts in agencies*, WASH. POST (May 20, 2017), [https://www.washingtonpost.com/politics/trump-administration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2-39a7-11e7-a058-dbb23c75d82\\_story.html](https://www.washingtonpost.com/politics/trump-administration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2-39a7-11e7-a058-dbb23c75d82_story.html). Cutbacks in civil rights enforcement and in support programs for minority, women and small businesses have occurred in the past at the FCC; the author of this article had to obtain congressional intervention to rescue FCC minority business offices from closure in 1981, 1989 and 2005. This history contrasts sharply with the plans of the current Chairman, who has upgraded the Commission's small business office. See *Chairman Pai Announces [Sanford] Williams to Serve as Director of Communications Business Opportunities Team*, FCC NEWS (June 7, 2017), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0607/DOC-345240A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0607/DOC-345240A1.pdf). Chairman Pai has also re-established the Advisory Committee on Diversity for Communications in the Digital Age, now re-named the Advisory Committee on Diversity and Digital Empowerment, which was not re-chartered in 2013 under the previous Chairman. See *FCC Seeks Nominations for Membership on Advisory Committee on Diversity and Digital Empowerment*, FCC NEWS (June 7, 2017), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0607/DA-17-557A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0607/DA-17-557A1.pdf). Recently the Chairman announced a broad set of civil rights initiatives aimed at bridging the digital divide. See Ajit Pai, Chairman, Fed. Comm. Comm'n, Remarks at MMTC's 9<sup>th</sup> Annual Broadband and Social Justice Summit, Washington, DC (Feb. 6, 2018).

<sup>82</sup> Harry M. Shooshan *supra* note **Error! Bookmark not defined.**



persuade Congress that a functional structure is preferable to a silo-based structure from the standpoint of good government.

### CONCLUSION

Organizing by function rather than by technology silos would have many benefits. The FCC would be in a better position to ensure consistency of treatment of technologies as technologies change, thereby producing fairness, efficiency, and a measure of economic stability in regulation that would enhance the overall investment potential of the tech sector.

High on the list of reasons why the FCC should be reorganized by function rather than by silo is that a function-based FCC would lead to more effective civil rights management and enforcement. That, in turn, would yield greater participation by minorities and women in the media and telecom industries. The Commission's obligation to regulate in the public interest by eliminating discrimination is just as compelling in one of its regulated industries as it is in any other. Platform neutrality and regulatory parity, delivered through functional reorganization of the FCC, can help deliver us to this Promised Land.

Please, FCC, reorganize thyself!