TOWARD A FEDERAL DATA AGENDA FOR COMMUNICATIONS POLICYMAKING

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I. INTRODUCTION

Policy debates and decision making in the communications policy arena increasingly turn on quantitative data analyses.[1] In this environment, issues of access to data and data quality are central to assessing the integrity of the policymaking process. The abilities of stakeholders to conduct research and integrate it into the policymaking process, and to assess and verify the research conducted and utilized by policymakers, have become increasingly important indicators of the transparency, objectivity, and participatory nature of the policymaking process.[2] These issues of data quality and access encompass the protocols and conventions surrounding how (and by whom) data are gathered,

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[1] *See* Philip M. Napoli & Michelle Seaton, *Necessary Knowledge for Communications Policy: Information Asymmetries and Commercial Data Access and Usage in the Policymaking Process*, 59 FED. COMM. L.J. 295 (2007) (illustrating how an increased reliance on quantitative data analysis has taken place in communications policymaking).

[2] *See, e.g.*, Dorothy Nelkin, *Scientific Knowledge, Public Policy, and Democracy: A Review Essay*, 1 SCI. COMM. 106, 118 (1979) ("Scientific knowledge, like land, labor, and capital, is a resource—indeed a commodity—and the ability to manipulate and control this resource has profound implications for the distribution of political power in democratic societies.").

the quantity and scope of available data, and the accessibility of data for policy analysis.

This article offers a critical assessment of the current state of the data environment in American communications policymaking. It draws upon a variety of current policy concerns, ranging from broadband deployment, to media ownership, to equal employment opportunities, in order to suggest that data access and data quality issues are serious and pervasive problems in communications policymaking. Underlying this analysis are fundamental ideas that have fallen into relative disuse in the communications policy arena: (1) that public policy should be made with publicly available data; and (2) that democracy is best served when the analyses that inform policymaking are transparent and widely accessible.

The aim of this article is to focus the attention of the policymaking and advocacy communities on data access and data quality issues, and to begin to develop the contours of an improved federal data agenda for communications policymaking. This data agenda is intended to identify key substantive and procedural changes that should be undertaken at the federal level to improve the accessibility and quality of important categories of data used in communications policymaking and policy analysis. Further, this analysis addresses the responsibilities and activities of the Federal Communications Commission ("FCC" or "Commission"), and also discusses the range of institutions with responsibilities for regulating and preserving a democratic, participatory public sphere.

Part II of this article articulates contemporary shortcomings in the quality and scope of data available to communications policymakers and policy analysts. It also describes the confluence of factors that have produced these inadequacies, from rapid change in information and communications technologies, to growing government reliance on commercial data collection, to the correspondingly diminished federal role in gathering, aggregating, evaluating, and disseminating data. Although this dynamic is a source of concern across a range of research fields,[3] this article focuses on the specific, and in some cases unique, problems of the communications sector.

Part III provides an account of access to data issues, specifically the impediments researchers and policymakers face in accessing data for use in policy analysis. This section also draws attention to the consequences of the priva-

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[3] *See generally* STEERING COMM. ON THE ROLE OF SCIENTIFIC & TECHNICAL DATA & INFO. IN THE PUB. DOMAIN, NAT'L RESEARCH COUNCIL, THE ROLE OF SCIENTIFIC AND TECHNICAL DATA AND INFORMATION IN THE PUBLIC DOMAIN (Julie M. Esanu & Paul F. Uhlir eds., 2003).

tization of many key areas of data gathering, as well as to the political and economic obstacles to greater data access.

Part IV provides the foundations of a federal data agenda for communications policymaking that could begin to address these problems of data quality, scope, and access. The proposals presented in this section are intentionally tentative and incomplete, as they are meant to initiate broader and more detailed discussions of research needs, federal responsibilities, and public ideals in communications policymaking.

II. DIMINSHED FEDERAL DATA COLLECTION AND THE QUALITATIVE LIMITATIONS OF COMMERCIAL DATA FOR PUBLIC POLICY

Historically, the federal government has played a significant role in gathering basic data on the conditions of American life, from the census to meteorological data to information regarding the structure and activities of regulated industries. American law and administrative practices provided, in most respects, a model of openness with regard to data. With limited exceptions, federally-produced data were freely accessible in the public domain. For example, federally-funded science supported a culture in which the legitimacy of results was based on the sharing of data and the independent confirmation of results.[4]

By the 1980s, this federal role in data collection was threatened. The privatization of government services and investments accelerated, favoring commercial production of data over public provisioning. The Bayh-Dole Act of 1980[5] resulted in significant privatization of publicly-funded research, which led to a massive interpenetration of public funding, university labor, and private enterprise. Revisions to the Office of Management and Budget's ("OMB") Circular A-76[6] forced the government to concede that it must defer to private enterprise in the performance of a growing range of services.

Additionally, the FCC's role in communications data collection was undercut by these pressures, and by the secondary effects of neglect, as most of its data collection responsibilities ceased to be a priority for regulators. Operating

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[4] *See* Jerome Reichman, *Discussion Framework*, *in* THE ROLE OF SCIENTIFIC AND TECHNICAL DATA AND INFORMATION IN THE PUBLIC DOMAIN, *supra* note 3, at 73, 74. An example of the decreasing role of the federal government in data collection can be seen by the drop in government funded scientific research. In the 1960s, the government funded two-thirds of all scientific research, while in 2000 the government only funded one-quarter. *Id.*

[5] The Bayh-Dole Act of 1980, 35 U.S.C. § 200 (2000).

[6] Office of Management and Budget, Circular A-76, Performance of Commercial Activities (Aug. 4, 1983), *available at* http://www.whitehouse.gov/omb/circulars/a076.pdf.

from an expansive view of deregulation in which the government's role was suspect, reporting regulations themselves began to be perceived as burdens on the regulated industries.[7] Reporting requirements were loosened or eliminated, and non-compliance penalties went unenforced.

This decline occurred as the media and telecommunications fields entered a period of dramatic evolution in technologies, industry structures, forms of public discourse, and, significantly, evidentiary standards of policymaking. As a result, policymakers and the courts increasingly demanded sophisticated empirical research in order to effectively understand and navigate these developments.[8] The collection and analysis of quantitative data has become the gold standard by which policy judgments are made.[9]

Throughout this transition, policymakers have done little to maintain, much less expand, the data sources required to facilitate analyses of contemporary policy questions. Today, communications policymakers rely heavily on the datasets developed by commercial data providers for their clients and the investment community, and, therefore, neglect their own substantial data collection capabilities and responsibilities.[10] This has created problems in both the scope and quality of policy inputs—scope insofar as commercially collected data are expensive to access and are not always structured in ways that illuminate public policy concerns,[11] and quality insofar as the data collection mechanisms of policymaking bodies such as the FCC and the National Telecommu-

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[7] *See* Napoli & Seaton, *supra* note 1, at 308–13.

[8] *See* PHILIP M. NAPOLI, THE BROADENING OF THE MEDIA POLICY RESEARCH AGENDA (2005), *available at* http://www.ssrc.org/programs/media/publications/PhilipNapoli.1.Final.doc; Napoli & Seaton, *supra* note 1, at 296; Robert Corn-Revere, *Economics and Media Regulation*, *in* MEDIA & ECONOMICS: THEORY AND PRACTICE 71, 83 (Alison Alexander, James Owers & Rod Carveth eds., 1993) (describing the FCC's move away from an "intuitive model" of policymaking and the agency's "newly discovered interest in the collection of economic data and analysis").

[9] *See* DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 6–7 (1997) (describing the "rationality project" that she sees "at the core of American political culture since the beginning"); *see also* Kurt Finsterbusch & Mary R. Hamilton, *The Rationalization of Social Science Research in Policy Studies*, 19 INT'L. J. COMP. SOC. 88, 88 (1978) ("Social scientists are becoming increasingly involved in policy research."); *see generally* Erik Albæk, *Between Knowledge and Power: Utilization of Social Science in Public Policymaking*, 28 POL'Y SCI. 79, 81 (1995); THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991).

[10] *See* Napoli & Seaton, *supra* note 1, at 311–13 ("Obtaining the relevant data from the private sector can often prove difficult, with price being the primary impediment.").

[11] *See id*. at 313, 323–25 (illustrating how commercial databases "are essentially 'repurposed' to address [public] policy questions" and the data gaps that can arise from this practice).

nications and Information Administration ("NTIA") are not consistently maintained.[12]

As the media and communications landscape evolved throughout the past two decades, the FCC consistently reduced its capacity to collect data in a number of important areas.[13] For example, reporting requirements for the industries under its regulatory authority have been repeatedly scaled back. The Commission has also halted the gathering of financial statements from broadcasters,[14] ceased gathering cable system subscriber data,[15] and reduced requirements for performance data in connection with the license renewal process.[16]

As a result, large parts of this data gathering responsibility shifted to the commercial sector.[17] Private data collection is often justified in terms of hoped-for efficiencies of private sector collection. This is certainly possible, but, in reality, the model does not fare well. Notably, there are few instances of competition in data provision, leading to monopoly power and no effective means of rewarding higher-quality products. Of equal or greater importance, commercial data collection is subject to a wide range of structural biases that complicate its use in policymaking settings. These range from the under-collection of data with lesser commercial value, such as data regarding poor or marginalized communities, to the voluntary nature of participation in commercial data-gathering enterprises, which can skew responses to questions concerning issues that greatly interest regulators.[18]

In the context of the FCC, the reasons for commercial data collection and the goals of public policy often fail to align. Commercial data are structured around the financial, investment, and marketing needs of media corporations

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[12] *See infra* notes 39–41 and accompanying text.

[13] *See* Napoli & Seaton, *supra* note 1, at 311–13.

[14] *See* James G. Webster, *The Role of Audience Ratings in Communications Policy*, 12 COMM. & L. 59, 63 (1990) ("[T]he FCC stopped collecting financial statements from broadcasters years ago.").

[15] *See* John Dunbar, A *Penchant for Secrecy: Why is the FCC So Determined to Keep Key Data from the Public?*, THE CENTER FOR PUBLIC INTEGRITY, May 22, 2003, http://www.openairwaves.org/telecom/report.aspx?aid=18 (noting that incomplete cable system subscriber data were found in the FCC's Cable Operations and Licensing System database due to the fact that "the FCC stopped collecting it after the 'deregulation' of the industry in 1994").

[16] *See In re* Radio Broadcast Services: Revision of Applications for Renewal of License and Commercial and Noncommerical AM, FM, and Television Licensees, *Report and Order*, 49 Rad. Reg. 2d (P & F) 740, 741 (Mar. 26, 1981).

[17] *See* Napoli & Seaton, *supra* note 1, at 311–13.

[18] *See* Philip M. Napoli, *Market Conditions and Public Affairs Programming: Implications for Digital Television Policy*, 6 HARV. INT'L J. OF PRESS/POL. 15, 20 n.7 (noting that non-response to the question regarding broadcast station revenues in the BIA Financial Network database was approximately twenty percent).

and investors—the data providers' primary clients. The FCC, in contrast, acts in response to a more complex concept of the public interest, balancing economic efficiency with an eye toward equity, diversity, and constitutional rights.[19] Commercial data sources are rarely constructed in ways that address the research questions emerging from this intricate, multifaceted mandate.

The FCC has recognized these limitations within the context of local telephone competition and broadband deployment data gathering. The FCC collects Form 477 ("Local Telephone Competition and Broadband Reporting") from telecommunications service and broadband providers in an effort to gauge the degree of local competition and the extent of broadband availability across the United States.[20] This modest reporting requirement produced resistance from the regulated industries, which argued that commercially available data sources were adequate for the FCC's analytical needs.[21] The Commission disagreed, countering:

> We adopt our tentative conclusion that only a comprehensively imposed, mandatory data collection effort will provide us with a set of data of uniform quality and reliability. In our experience, other publicly available information sources present less than complete pictures of actual conditions and trends in developing local telephone service markets and in the deployment of broadband. Nor do we find, among the publicly available sources suggested by commenters, the type of regular, consistent and comprehensive data necessary to illustrate developments in these markets. Several commenters suggest, for example, that we rely on company reports to shareholders and to other regulatory agencies, or on the studies prepared by private consulting firms that are based on such company reports. We find these sources to be incomplete and inconsistent.[22]

The Commission specifically noted:

> [F]inancial and investment analysts tend to collect more complete information about publicly traded companies than about privately held companies, and may choose to analyze closely only a subset of companies. Perhaps as a result of this focus, analyst reports tend to lack data concerning developments in rural and underserved markets and by smaller companies.[23]

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[19] *See generally* PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY 63–96 (2001) (providing an overview and discussion of the meaning of the public interest standard in communications regulation).

[20] *See In re* Local Competition and Broadband Reporting, *Report and Order*, 15 F.C.C.R. 7717, ¶ 1 (Mar. 24, 2000) [hereinafter 2000 Data Gathering Report] (adopting rules and a standardized form to collect "basic information about two critical and dynamic areas of the communications industry: the development of local telephone service competition and the deployment of broadband services"); *see also In re* Local Telephone Competition and Broadband Reporting, *Report and Order*, 19 F.C.C.R. 22,340 (Nov. 9, 2004) [hereinafter 2004 Data Gathering Report] (extending the reporting requirements and gathering more granular data from service providers).

[21] *See* 2000 Data Gathering Report, *supra* note 20, at 7724 n.26, 7758 n.226.

[22] *Id.* ¶ 14.

[23] *Id.*

As these passages illustrate, the informational needs of policymakers and those of the primary client base of commercial data providers often differ.[24]

On the other hand, many areas of communications policy depend upon commercial data providers, often creating a frustrating dynamic for researchers. Journalist John Dunbar documented how efforts to obtain and analyze comprehensive data from the FCC regarding the ownership of media outlets—a topic that falls directly under its regulatory purview—are redirected to commercial data providers, who then impose their own, often onerous, terms of access.[25] Even when access is granted, the commercial orientation of these databases makes them ill-suited to many important public policy considerations, such as the number and location of duopolies, the patterns of cross-media ownership, or the clustering of radio station ownership.[26] Although such information could be collected easily by commercial data providers in the course of other data gathering, because it serves no compelling commercial purpose, the data are not obtained. Short of collecting its own data, the FCC can provide no remedy, as it is powerless to determine which data are collected or how they are structured.

Data concerning economically marginalized populations are a frequent break point between the information needs of policymakers and those of commercial data providers. For example, examination of the most widely-used, commercially-available database of broadcast and newspaper market, ownership, and financial data reveals significant omissions in minority-targeted and foreign-language media outlets.[27] Similarly, a recent Government Accountabil-

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[24] *See* 2004 Data Gathering Report, *supra* note 20, ¶ 7. The Commission extended its critique of alternative data sources stating:

> Moreover, we disagree with commenters that the availability of alternative data sources is an adequate substitute for the Form 477. In our experience, most if not all commercially available studies of residential services adoption derive their data in significant part from the Commission's Form 477-based public reports. And, no nationwide studies of broadband deployment or of local telephone competition are based on better sources of data for rural and other hard-to-serve areas. Voluntary membership surveys conducted by commenters NCTA and OPASTCO, and also by the National Exchange Carrier Association (NECA) provide welcome evidence that the incumbent LECs that *respond* to the surveys are deploying broadband services to substantial—and increasing—percentages of their customer base. Entities that choose not to participate may have a different experience.

Id.

[25] *See* John Dunbar, *supra* note 15.

[26] *Id.*; E-mail from Angela Campbell, Director, Inst. for Pub. Representation at Georgetown Univ. Sch. of Law, to author (Dec. 14, 2006, 14:16 EST) (on file with CommLaw Conspectus); E-mail from Peter DiCola, Research Dir., Future of Music Coal., to author (Dec. 19, 2006, 16:31 EST) (on file with CommLaw Conspectus).

[27] *See* MARK LLOYD & PHIL NAPOLI, REPORT OF THE CENTER FOR AMERICAN PROGRESS, LOCAL MEDIA DIVERSITY MATTERS 15 (2007),

ity Office ("GAO") reanalysis of the FCC's broadband data concluded that existing data gathering efforts likely do not provide a thorough accounting of the availability of broadband services to Native Americans residing on tribal lands.[28] Such lack of rigor not only undermines robust analyses of media markets, but also reinforces perceptions about the low priority accorded diversity and inclusion policies at the FCC.

Because of these inadequacies in scope and quality, a growing range of crucial research questions regarding, for example, the impact of industry structure on media content or the distribution of types of traffic on the Internet, simply cannot be answered today with any degree of certainty. The discussion that follows highlights some key contemporary policymaking areas in which problems of quality, scope, and reliability of data undermine the extent to which that data can effectively inform policymaking.

One of the FCC's primary areas of responsibility is the regulation of the ownership of media and telecommunications entities.[29] Changes in existing ownership policies must be predicated on a thorough and detailed understanding of the current landscape.[30] It is clear, however, that neither the FCC nor the

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http://www.americanprogress.org/issues/2007/01/pdf/media_diversity.pdf (noting that the commonly-used BIA database of newspapers, television stations, and radio stations does not adequately identify ethnic media outlets). The FCC's own recent research similarly has noted that "the BIA data which provides all the relevant information needed with respect to ownership, does not include Hispanic newspapers," and thus was required to drop Hispanic newspapers from its analysis of the effects of ownership and market structure on news provision. PEDRO ALMOGUERA, THE EFFECT OF OWNERSHIP AND MARKET STRUCTURE ON NEWS OPERATIONS, *in* DANIEL SHIMAN, KENNETH LYNCH, CRAIG STROUP & PEDRO ALMOGUERA, NEWS OPERATIONS: FCC MEDIA OWNERSHIP STUDY #4, at IV-5 (2007), *available at* http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A5.pdf.

[28] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, CHALLENGES TO ACCESSING AND IMPROVING TELECOMMUNICATIONS FOR NATIVE AMERICANS ON TRIBAL LANDS (2006), *available at* http://www.gao.gov/new.items/d06189.pdf.

[29] *See In re* 2006 Quadrennial Review—Review of the Commissioner Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-121; 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Cross-Ownership of Broadcast Stations and Newspapers, MB Docket No. 01-235; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MB Docket No. 01-317; Definition of Radio Markets, MM Docket No. 00-244, *Further Notice of Proposed Rule Making*, (June 21, 2006), http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=FCC-06-93A1.pdf [hereinafter Broadcast Ownership Further Notice].

[30] News Release, FCC, FCC Chairman Michael Powell Announces Creation of Media Ownership Working Group (Oct. 29, 2001), *available at* http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2001/nrmc0124.pdf. Former FCC Chairman Michael Powell noted at the start of the 2002 media ownership proceeding that:

commercial providers possess adequate data to support robust, evidence-driven policymaking in this area.[31]

A. Minority Ownership

Minority ownership, in particular, is a central area of policy concern. Diversity has been, and continues to be, one of the FCC's core policy principles. The Commission is obligated in its decision making to preserve and promote diversity in the media.[32] Data on minority ownership is consequently of high policy value, but the low economic power of minority groups makes it of relatively little commercial value. In such a context, federal data collection has traditionally been the sole source of detailed information on this subject.

The FCC has not always been the only actor in this area. The National Telecommunications and Information Administration ("NTIA") initiated an effort to assess minority ownership in the 1990s, but issued its last report on the subject in 2000.[33] The FCC continues to gather data on minority ownership, but recent scrutiny of its data revealed considerable problems. S. Derek Turner and Mark Cooper, in their efforts to assess the current state of minority and female television station ownership in the United States, found that the data the FCC require from all full-power commercial broadcast stations (Form 323) are reported only partially and, even then, erratically.[34] Specifically, summary re-

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> [R]ebuilding the factual foundation of the Commission's media ownership regulations is one of my top priorities. For too long, the Commission has made sweeping media policy decisions without a contemporaneous picture of the media market. We need to rigorously examine whether current forms of media regulation are achieving the Commission's policy objectives, and how changes in regulations would affect the policy goals of competition, diversity, and localism.

Id.

[31] *See infra* notes 97–109 and accompanying text.

[32] *See* ADVISORY COMM. ON DIVERSITY FOR COMMC'NS IN THE DIGITAL AGE, CHARTER (2006), *available at* http://www.fcc.gov/DiversityFAC/docs/CharterDec2006.pdf. (noting that the FCC has the responsibility to make "a rapid, efficient, Nationwide wire and radio communications service" available without discrimination and "to work toward elimination of market entry barriers" to promote diversity, and that "[t]hese goals can best be achieved by ensuring that as broad a cross-section of the public as possible has the opportunity to own and/or manage communications and communications related companies"); *see also* NAPOLI, *supra* note 19, at 125–52 (providing a discussion of the principle of diversity in communications regulation and policy).

[33] The NTIA issued reports on minority commercial broadcast ownership in the United States annually from 1990 through 1994, and from 1996 through 1998. *See* NAT'L TELECOMM. & INFO. ADMIN., CHANGES, CHALLENGES, AND CHARTING NEW COURSES: MINORITY COMMERCIAL BROADCAST OWNERSHIP IN THE UNITED STATES (2000), *available at* http://search.ntia.doc.gov/pdf/mtdpreportv2.pdf.

[34] *See* S. DEREK TURNER & MARK COOPER, FREE PRESS, OUT OF THE PICTURE: MINORITY & FEMALE TV STATION OWNERSHIP IN THE UNITED STATES 6–7 (2006), *available at*

ports of the data gathered by the Commission only list each minority or female-owned station's Form 323 response. No aggregation of the data obtained from the stations is conducted for these reports, nor are the responses provided by stations not owned by women or minorities included in the summary reports.[35] Without access to the full range of Form 323 responses, it is difficult for researchers to conduct rigorous analyses, as information from the entire population of stations is not available for review. Perhaps more significantly, Turner and Cooper found substantial omissions in the data. For instance, some of the nation's largest minority radio and television ownership groups were missing from the summary reports and some station owners were not included in the summary reports for years at a time, despite continuity of ownership during the time periods examined.[36]

According to Turner and Cooper, these inaccuracies are likely an outgrowth of problems with FCC data handling—in this case, the automated process through which data are harvested from the electronic filings.[37] Specifically, this process is incapable of accurately capturing the various types of ownership and the consequent complexities of the information filed by the individual stations.[38] Regardless of their cause, these shortcomings must be addressed if the FCC desires robust analysis and well-informed policy regarding minority ownership.

A recent study sponsored by the FCC similarly encountered a range of difficulties in using the Commission's minority ownership data, particularly when attempting to conduct analyses of changes in minority ownership over time.

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http://www.stopbigmedia.com/files/out_of_the_picture.pdf.

[35] *See id.* at 7.

[36] *See id.* (noting, for example, the absence of minority-owned radio station ownership group Radio One from the FCC's minority ownership database, as well as the omission of minority-owned television station group Granite Broadcasting; and noting also "[s]ome station owners listed in the 2003 summary are missing from the 2004 report but reappear in the 2006 summary, despite the fact that ownership had not changed during the interim period").

[37] *See id.* at 8.

[38] *See id.* Turner and Cooper specifically noted that:

> The answer likely lies in how the larger-group stations report ownership information, and how the FCC harvests the information for their summary reports. Most of the licenses of those stations missed by the FCC are 'owned' by intermediate entities, which are in some cases, many degrees separated from the 'actual' owner. Some stations file more than 20 Form 323 forms [one for each holding entity], with the true owners listed on only one of the filed forms. And in many cases, the actual ownership information is attached as an exhibit and not listed on the actual form. Thus the FCC, which tabulates the information for their summaries by harvesting these electronic forms via an automated process, misses stations that file in this convoluted and confusing manner.

Id. Due to the complicated ownership structures of some stations, those stations may file more than twenty form 323s each. *See id.*

Focusing specifically on Form 323, the Commission's analysis noted, "[u]nfortunately, there are a variety of problems associated with Form 323 data when the data are considered for use in constructing a time series from 2001 through 2005."[39] These problems include irregular filing deadlines, filing exemptions for sole proprietorships or partnerships comprised entirely of natural persons (rather than corporate or other business entities), and incorrect responses by many stations.[40] These failings are reflected in the assessment provided by another recent FCC-commissioned study that examined minority and female ownership of media enterprises, which concluded "[t]he data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis."[41] The authors consequently recommended that "the FCC take serious steps to ensure that a complete census of media firms is carefully assembled so that ownership patterns can be accurately reported and tracked over time."[42] With such strong consensus regarding the failures of process in this area, Form 323 would be a logical starting point for the FCC to begin strengthening the integrity of its data collection practices.

B. Employment

A wide array of FCC regulatory activity depends upon the Commission's ability to accurately gauge employment patterns in the sectors under its regulatory authority.[43] Areas in which employment data can inform policymaking include media ownership regulations (involving questions of the impact of consolidation on employment patterns) and equal employment opportunity regulations (which focus on issues related to minority employment). There are, unfortunately, a number of problems in this area of federal data gathering as well.

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[39] C. ANTHONY BUSH, MINORITY AND WOMEN BROADCAST OWNERSHIP DATA, *in* KIRAN DUWADI, SCOTT ROBERTS & ANDREW WISE, OWNERSHIP STRUCTURE AND ROBUSTNESS OF MEDIA: FCC MEDIA OWNERSHIP STUDY #2, at 13 (2007), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf.

[40] *See id.*

[41] ARIE BERESTEANU & PAUL B. ELLICKSON, MINORITY AND FEMALE OWNERSHIP IN MEDIA ENTERPRISES 2–3 (June 2007), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A8.pdf.

[42] *Id.* at 20.

[43] *See* Peter DiCola, *Employment and Wage Effects of Radio Consolidation in* MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 57 (Philip N. Napoli ed., 2007) ("Although the employment effects of [media] consolidation have economic importance in their own right, they also fall under the purview of the FCC's major policy goals of ensuring localism and fostering diversity.").

An initial concern is that the generality of federal data collection conducted by the Bureau of Labor Statistics regarding employment and wages makes it difficult to answer questions about communications and media industries in particular. This problem was raised in recent work on the impact of regulatory changes on the commercial radio industry. The data in this industry are typically aggregated and reported at the market level, making outlet- or employer-level analyses difficult. Moreover, respondent sample sizes for individual communications industry sectors such as radio are often too small to facilitate useful analyses, and the data are not always sufficiently broken down along industry lines.[44]

Acquisition of minority employment data is another area in which federal activities have decreased. As with the minority ownership area, this is a field almost entirely dependent on federal data collection (some professional associations gather data in this area, but seldom in a form sufficiently comprehensive for policy analysis). Historically, the FCC maintained Equal Employment Opportunity ("EEO") rules, which required broadcast licensees and cable operators to engage in affirmative efforts to hire women and minorities.[45] Prior to 1998, these rules included explicit quantitative guidelines concerning the extent to which the demographic composition of media outlets should reflect the demographic composition of the surrounding communities.[46]

These rules, however, have been dramatically scaled back over the past ten years, and with them, the Commission's practice of gathering minority employment data.[47] This retreat was largely a response by the Commission to a decision by the United States Court of Appeals for the District of Columbia, in which the EEO rules were held unconstitutional.[48] In response to the ruling, the FCC issued revised EEO rules that required far less data to be filed with the Commission.[49] Data regarding the race and gender breakdowns of employees

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[44] See *id.* at 68–69, for a discussion of these limitations in available data.

[45] *See In re* Petition for Rulemaking to Require Broadband Licensees to Show Nondiscrimination in Their Employment Practices, *Report and Order*, 18 F.C.C.2d 240, ¶¶ 1, 7–8 (June 4, 1969) (providing broadcast EEO rules); *see also In re* Amendment of the Commission's Rules to Require Operators of Community Antenna Television Systems and Community Antenna Relay Station Licensees to Show Nondiscrimination in Their Employment Practices, *Report and Order*, 34 F.C.C.2d 186, ¶ 1 (Mar. 23, 1972) (providing cable EEO rules).

[46] *See In re* Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants, *Memorandum Opinion and Order*, 79 F.C.C.2d 992, ¶ 19 (July 1, 1980).

[47] *See In re* Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, *Report and Order*, 15 F.C.C.R 2329, ¶ 113 (Jan. 20, 2000) [hereinafter 2000 Cable EEO Report].

[48] Lutheran Church-Mo. Synod v. FCC, 141 F.3d 244, 256 (D.C. Cir. 1998).

[49] *See* 2000 Cable EEO Report, *supra* note 47, ¶ 13.

is no longer required in connection with EEO reporting.[50] Instead, the Commission now only asks licensees to provide, on an annual basis, information about the number of vacancies open and filled during the license period, along with some additional information about recruitment and outreach sources utilized.[51]

In 2004, the FCC proposed reinstating the gathering of more detailed demographic information about broadcast and cable outlet employees—with the notable qualification that the data would not be used in monitoring or enforcing the Commission's EEO rules.[52] Instead, the FCC proposed to use the data only "to compile industry trend reports and reports to Congress."[53] According to the FCC, although the *Lutheran Church* decision limited the Commission's ability to enforce its EEO rules, "[t]he court did not conclude that the Commission lacks authority to collect statistical employment data for the purpose of analyzing industry employment trends . . . or that collecting employment data for those purposes would unconstitutionally pressure broadcasters to adopt race or gender-based hiring policies."[54] This industry trend proposal continues to languish within the Commission,[55] and as a result, there is no current information regarding the demographic composition of broadcast and cable outlets.

Also unfortunate are indications that the diminished data collection associated with the scaled-back EEO rules has been accompanied by erratic reporting on the part of the respondents. One recent study discovered missing data issues in over half of a sample of 350 station audits conducted by the FCC in 2003 and 2004.[56] These omissions raise questions about the extent to which the Commission is using the data to rigorously assess compliance with the current incarnation of the EEO rules.

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[50] *Id.* ¶ 6.

[51] *Id.* ¶¶ 6–7. Similarly, in 2004 the FCC proposed "to eliminate the 22-year old requirement that common carriers provide annual reports on minority and female employment." David Honig, *Why the FCC Avoids Broadcast Diversity Metrics*, *in* MEDIA DIVERSITY AND LOCALISM: MEANING, METRICS, AND THE PUBLIC INTEREST 72 (2003), *available at* http://www.bnet.fordham.edu/public/comm/pnapoli/MediaDiversityLocalismStatements.doc.

[52] *See In re* the Commission's Broadcast and Cable Equal Employment Opportunities Rules and Policies, *Third Report and Order and Fourth Notice of Proposed Rule Making*, 19 F.C.C.R. 9973, ¶¶ 1–2 (Apr. 19, 2004) [hereinafter 2004 Cable EEO Report]. Gathering such detailed demographic information would have involved reinstating the reporting requirements of Forms 395A and 395B, associated with the earlier incarnation of the EEO rules.

[53] *Id.* ¶ 2.

[54] *Id.* ¶ 7.

[55] *See infra* notes 124–27 and accompanying text.

[56] *See* Philip M. Napoli, FCC EEO Audit Analysis 3 (Apr. 2006) (unpublished working paper on file with author).

C. Broadband Deployment

Rapid broadband deployment has become an increasingly important communications policy goal in recent years.[57] In pursuit of this goal, the FCC instituted a data gathering process designed to keep policymakers abreast of the current state of broadband deployment, under the assumption that "[i]nformation about broadband availability and deployment throughout the nation is essential to enable us to assess the success of our broadband policies."[58]

However, the FCC's data gathering efforts in this area have been the subject of criticism and controversy, not only in terms of the quality of the data, but also in terms of its accessibility.[59] An assessment of the FCC's data by the GAO[60] raised a number of questions regarding the utility of the FCC's data for addressing important policy concerns. A significant GAO concern was that the manner in which the FCC's broadband data are gathered and reported may lead to overstatements in broadband availability, particularly in rural areas.[61] After

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[57] *See, e.g.*, *In re* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements, 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, *Policy Statement*, 20 F.C.C.R. 14,986, ¶ 2 (Aug. 5, 2005).

[58] *In re* Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over over Internet Protocol (VOIP) Subscribership, *Notice of Proposed Rulemaking*, 22 F.C.C.R. 7760, ¶ 1 (Feb. 26, 2007). The FCC began collecting broadband availability and deployment data in 2000. *Id.* ¶ 2.

[59] *See infra* notes 121–23 and accompanying text.

[60] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, BROADBAND DEPLOYMENT IS EXTENSIVE THROUGHOUT THE UNITED STATES, BUT IT IS DIFFICULT TO ASSESS THE EXTENT OF DEPLOYMENT GAPS IN RURAL AREAS 42–43 (2006), *available at* http://www.gao.gov/new.items/d06426.pdf.

[61] *See id.* In particular, GAO noted the following issue, among others, with using subscribership indicators at the zip-code level:

> Because a company will report service in a zip code if it serves just one person or one institution in that zip code, stakeholders told us that this method may overstate deployment in the sense that it can be taken to imply that there is deployment throughout the zip code even if deployment is very localized. We were told that this issue might particularly occur in rural areas where zip codes generally cover a large geographic area. Based on our own analysis, we found, for example, that in some zip codes more than one of the large established cable companies reported service. Because such providers rarely have overlapping service territories, this likely indicates that their deployment was not zip-code-wide and that the number of providers reported in the zip code overstates the level of competition to individual households.

the GAO made a number of adjustments to the FCC's data and conducted a detailed reanalysis of the adjusted data, the new results proved substantially different from those produced by the FCC. For instance, the FCC's analysis of the data showed that the median number of broadband providers in a zip code was eight, whereas the GAO's analysis indicated that the median number was only two—a very important difference in a debate framed by competition policy.[62]

These problems have resonated with wider anxiety about America's slipping rank in broadband deployment—currently sixteenth in the world according to the International Telecommunications Union.[63] The FCC recently initiated a rulemaking proceeding on the Development of Nationwide Broadband Data,[64] and Congress has held hearings on the subject.[65] Bills addressing broadband data gathering are moving through both houses of Congress,[66] with plans for: a) revising the definitional threshold for broadband service; b) expanding zip code reporting to nine digits; c) including questions regarding residential computer usage and Internet subscribership in U.S. Census surveys; d) requiring

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Id.

[62] *See id*. at 17–18. The GAO specifically found that:

> Based on FCC's data, we found that the median number of providers reporting that they serve zip codes . . . was 8; in 30 percent of these zip codes, 10 or more providers report that they provide service. Only 1 percent of respondents lived in zip codes for which no broadband providers reported serving at least one subscriber, according to FCC's data. To better reflect the actual number of providers that each of the survey respondents had available at their residence, we made a number of adjustments to FCC's provider count based on our analysis of the providers, certain geographic considerations, and information provided by the survey respondents. After making these adjustments, the median number of providers for the respondents fell to just 2, and we found that 9 percent of respondents likely had no providers of broadband at all.

Id.; see also INDUS. ANALYSIS & TECH. DIV., FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2005, at 4 (2006), *available at* http://www.nrri.org/dspace/bitstream/2068/1030/1/High-Speed+Internet+Access+Report+as+of+Dec+2005.pdf.

[63] *See* Int'l Telecomm. Union, Economies by Broadband Penetration, 2005, http://www.itu.int/ITU-D/ict/statistics/at_glance/top20_broad_2005.html (last visited Nov. 16, 2007).

[64] *See In re* Development of Nationwide Broadband Data to Evaluate Reasonably and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol (VOIP) Subscribership, *Notice of Proposed Rulemaking*, 22 F.C.C.R. 7760 (Feb. 26, 2007).

[65] House Committee on Energy and Commerce, Hearing, http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.051707.Broadband.mapping.shtml (last visited Nov. 16, 2007).

[66] *See* Broadband Census of America Act of 2007, H.R. 3919, 110th Congress, 1st Session (2007); Broadband Data Improvement Act, S. 1492, 110th Congress, 1st Session (2007).

the FCC to conduct comparative analyses of broadband deployment with other nations; and e) requiring the NTIA to develop and maintain a map of broadband deployment in the United States.[67]

D. Content

Although the FCC has dramatically reduced direct regulation of media content, more attention has recently been given to the indirect impact of various regulatory measures on content.[68] The FCC itself conducted a number of studies in this area, by, for example, examining the relationship between ownership, market conditions, and the provision of local news and public affairs programming.[69] The FCC also studied the relationship between ownership structure and the political orientation of news content,[70] as well as the diversity of programming in both radio and television, and their relationships to ownership conditions.[71]

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[67] *See* H.R. 3919 §§ 2–5; *see also* S. 1492 §§ 1–5.

[68] *See* NAPOLI, *supra* note 8, at 3 (noting that the FCC "appears more willing to engage in research touching upon the content output of media organizations than it has in the past").

[69] *See* THOMAS C. SPAVINS, LORETTA DENISON, SCOTT ROBERTS & JANE FRENETTE, THE MEASUREMENT OF LOCAL TELEVISION NEWS AND PUBLIC AFFAIRS PROGRAMS: FCC MEDIA OWNERSHIP STUDY # 7 (2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.pdf. For more recent research on this topic, see GREGORY S. CRAWFORD, TELEVISION STATION OWNERSHIP STRUCTURE AND THE QUANTITY AND QUALITY OF TV PROGRAMMING: FCC MEDIA OWNERSHIP STUDY #3, at 2–4 (2007), *available at* http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A4.pdf (examining the relationship between ownership structure and the provision of news and public affairs programming); SHIMAN ET AL., *supra* note 27 (examining the relationship between television and radio station ownership and market structures and the provision of news and public affairs programming).

[70] *See, e.g.*, JEFFREY MILYO, THE EFFECTS OF CROSS-OWNERSHIP ON THE LOCAL CONTENT AND POLITICAL SLANT OF LOCAL TELEVISION NEWS: FCC MEDIA OWNERSHIP STUDY #6 (2007), *available at* http://fjallfoss.gov/edocs_public/openAttachment.do?link=DA-07-3470A7.pdf (examining the liberal/conservative bias of television news outlets and its possible relationship to newspaper-television cross-ownership); DAVID PRITCHARD, VIEWPOINT DIVERSITY IN CROSS-OWNED NEWSPAPERS AND TELEVISION STATIONS: A STUDY OF NEWS COVERAGE OF THE 2000 PRESIDENTIAL CAMPAIGN: FCC MEDIA OWNERSHIP STUDY #2 (2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A7.pdf.

[71] *See, e.g.*, TASNEEM CHIPTY, STATION OWNERSHIP AND PROGRAMMING IN RADIO: FCC MEDIA OWNERSHIP STUDY #5 (2007), *available at* http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A6.pdf; MARA EINSTEIN, PROGRAM DIVERSITY AND THE PROGRAM SELECTION PROCESS ON BROADCAST NETWORK TELEVISION: FCC MEDIA OWNERSHIP STUDY #5 (2002), *available at* http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DOC-226838A10.pdf; GEORGE WILLIAMS, KEITH BROWN & PETER ALEXANDER, RADIO MARKET STRUCTURE AND MUSIC DIVERSITY: FCC MEDIA OWNERSHIP STUDY #9 (2002), *available at*

Given the growing emphasis on this kind of analysis, existing federal efforts to gather relevant content data are inadequate. Any systematic efforts to assess television or radio programming—particularly at the local market level, where most contemporary regulations are directed—face an immediate problem of scarce and fragmented data sources. Currently, the FCC gathers minimal content-related data. Broadcast licensees are required to maintain lists of programs that address the needs and interests of their communities, but this information is not required to be submitted to the Commission.[72] Rather, it need only be made available to the public at the broadcast location. An effort by the Commission in 2000 to expand and standardize this reporting requirement met with substantial industry resistance, and this rulemaking proceeding has since languished.[73]

The only reasonably detailed content data that licensees are required to submit to the Commission focuses on the three-hour-per-week educational children's programming requirement.[74] These quarterly Children's Television Programming Reports are submitted to the Commission, which maintains a publicly accessible on-line database,[75] and maintained in the licensee's public inspection file.[76] These reports require broadcast licensees to "identify the educational and informational programs aired by the licensee over the previous quarter and the days and times these programs were regularly scheduled, the age of the target audience for each program, and the average number of hours per week of core programming broadcast over the past quarter."[77]

In the children's programming context, the Commission has recognized the benefits of gathering systematic programming data and making these data widely available.[78] Indeed, the FCC,[79] along with a number of academic and

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http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A18.pdf.

[72] *See In re* Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, MM Docket No. 00-168, *Notice of Proposed Rulemaking*, 15 F.C.C.R. 19,816, ¶ 33 (Sept. 14, 2000) [hereinafter Disclosure Requirements Notice] ("While licensees must maintain certain material in a station's public inspection file, they are generally not required to file such information or reports with the Commission.").

[73] *Id.* ¶ 16.

[74] *See In re* Extension of the Filing Requirement for Children's Television Programming Reports (FCC Form 398), *Report and Order and Further Notice of Proposed Rulemaking*, 15 F.C.C.R. 22,921, ¶¶ 2–7 (Sept. 14, 2006) [hereinafter Children's Television Report] This requirement was instituted in response to the Children's Television Act of 1990. Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a, 303b, 394).

[75] FCC, KidVid Public Access, http://fjallfoss.fcc.gov/KidVid/public/report/10/query.faces (last visited Nov. 16, 2007).

[76] *See* Children's Television Report, *supra* note 74, ¶ 4.

[77] *Id.*

[78] *See id.* ¶¶ 5, 9 ("[I]nformation contained in the reports can also be used by parents, educators, and others interested in educational programming to monitor a station's perform-

nonprofit organizations,[80] utilized the data to facilitate detailed studies of the availability of educational children's programming. Yet, despite the FCC's clear recognition of the value in making such programming data widely available, there remains a dichotomy between the rules governing children's programming and those governing all other programming-related information contained within a licensee's public inspection file. The latter is only required to be maintained on-site within broadcast stations' public inspection files,[81] where, of course, their geographical dispersion and inconsistent archiving make the information much less accessible to the public and to researchers.

Of course, such records provide an indirect indicator of the actual media content, and can themselves suffer the flaws associated with unmonitored self-reporting. Researchers seeking direct access to media content (particularly on an outlet-by-outlet basis) have relatively few archival options. The Vanderbilt Television News Archive provides a reasonably comprehensive historical database of the Big Three (ABC, CBS, NBC) broadcast television networks' nightly newscasts, but little else.[82] When researchers try to assess either non-news programming at the national level or any form of programming broadcast

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ance in complying with the CTA and the Commission's rules. In this way, the public can play an active role in helping to enforce children's programming requirements.").

[79] *See, e.g.*, MASS MEDIA BUREAU, FCC, THE EFFECT OF PREEMPTION ON CHILDREN'S EDUCATIONAL AND INFORMATIONAL PROGRAMMING (1998), *available at* http://www.fcc.gov/Bureaus/Mass_Media/Public_Notices/da982306.pdf.

[80] *See* Children's Television Report, *supra* note 74, ¶ 10. Specifically the FCC noted in its Report that:

> [E]vidence also indicates that a variety of organizations, including the CME [Center for Media Education], the National Institute on Media and the Family, and the Annenberg Public Policy Center at the University of Pennsylvania, use the reports to track national trends in children's television programming and to develop tools to inform parents and others about children's programming. In addition to these groups . . . other organizations use or plan to use the reports, including the American Center for Children and the Media, the Center for Research on the Effects of Television, the Center for Educational Priorities, Children Now, the Media Literacy Online Project, and Mediascope. . . . [T]he reports are integral to the academic research undertaken at centers such as the Children and Media Project in the Department of Psychology at Georgetown University, and the Center for Communication and Social Policy at the University of California at Santa Barbara.

Id.

[81] *See id.* ¶ 9 ("Members of the public can view reports from a number of stations easily without having to contact each station individually.").

[82] *See* Vanderbilt Television News Archive, http://tvnews.vanderbilt.edu (last visited Nov. 16, 2007); *see also* Scott L. Althaus, Jill A. Edy & Patricia F. Phalen, *Using the Vanderbilt Television Abstracts to Track Broadcast News Content: Possibilities and Pitfalls*, 46 J. BROAD. & ELEC. MEDIA 473 (2002) (discussing the strengths and limitations of the Vanderbilt Television News Archive as a research tool); *See generally*, Marshall Breeding, *Building a Digital Library of Television News*, COMPUTERS IN LIBRARIES, June 2003.

at the local level (whether radio or television), systematic archival resources are virtually nonexistent.

In 1997, the Library of Congress released the results of a detailed study on the current state of American television and video preservation.[83] This study grew out of numerous hearings involving a wide range of stakeholders.[84] The report paints a grim picture of television and video preservation in the United States as a whole, but reserved its bleakest assessment for the state of local television newscasts preservation[85]—content that informs a wide range of analyses relied upon by policymakers. A number of recent FCC analyses related to its media ownership rules focused on local news, which is often treated as an indicator of media responsiveness to local communities.[86] In addition, broadcast license renewal challenges have, in many instances, revolved around the analysis of local news programming.[87] Yet, there have never been any meaningful federal efforts to archive the content that grounds analysis in these policy areas.

The current archival situation is bad, and becoming worse. According to the Library of Congress report, "[t]he most devastating losses have already occurred among news film and videotape files of local television stations across the United States."[88] It is estimated that less than ten percent of local news programming survives.[89] According to the report, "[e]ven today, local news tapes are rarely kept more than a week before they are recycled."[90] And yet, according to the report, "[e]very group that has studied the selection of television for preservation has concluded that all news programs should be retained and preserved as aired."[91] Similarly, political communications scholar J.H. Snider has observed the seriousness of the problem that affects local television

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[83] WILLIAM T. MURPHY, LIBRARY OF CONGRESS, A REPORT ON THE CURRENT STATE OF AMERICAN TELEVISION AND VIDEO PRESERVATION, at xiii (1997), *available at* http://www.loc.gov/film/tvstudy.html.

[84] *Id.* at 4.

[85] *See id.* at 4–5, 88–89.

[86] *See, e.g.*, CRAWFORD, *supra* note 69; MILYO, *supra* note 70; SHIMAN ET AL., *supra* note 27; SPAVINS ET AL., *supra* note 69.

[87] *See* KAY MILLS, CHANGING CHANNELS: THE CIVIL RIGHTS CASE THAT TRANSFORMED TELEVISION (2004) (chronicling efforts during the 1960s by the Office of Communication of the United Church of Christ to monitor local television news broadcasts in an effort to challenge the license of Mississippi broadcast station WLBT-TV); *see also* Free Press, Challenge a License, http://www.freepress.net/content/license_challenge?DE (last visited Nov. 9, 2007) (instructing people how to challenge a broadcast license, including advice on how to monitor local news and public affairs programs).

[88] *See* MURPHY, *supra* note 83, at xiv.

[89] *See id.* at 88–90.

[90] *Id.* at xiv.

[91] *Id.*

news archives, noting that although "[l]ocal TV news has become a vital democratic intermediary," archives of local television news programs "are, for practical purposes, inaccessible."[92]

As the congressional report notes, the preservation of entertainment programming has improved over the years, due in large part to the tremendous monetary incentives associated with archiving programming for later commercial sale through cable, syndication, on-demand, DVD, online distribution, and other new channels.[93] News, in contrast, has a much more limited shelf life in the commercial sector and, consequently, more limited long-term revenue prospects. Commercial incentives to systematically preserve news content are largely absent and, as the report notes, "there is no FCC requirement that local newscasts be saved."[94] However, scattered local news programming preservation efforts do exist at the state and local level, including more than forty archives housed in locations such as universities and state historical societies.[95] These efforts often operate under conditions that do not ensure comprehensive data collection, long-term preservation, or efficient access.[96] A wide range of smaller archiving and media monitoring projects exists at universities and in the nonprofit sector, but these are inevitably narrow in their focus and, in many cases, on uncertain legal ground in regard to copyright and access policies.

What is particularly troubling about this state of affairs is the extent to which the FCC continues to ask questions, the answers to which depend on data that are virtually non-existent. For instance, the FCC's recently released

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[92] *See* James Snider, *Local TV News Archives as a Public Good*, 5 HARV. INT'L J. OF PRESS/POL., SPRING 2000, at 111.

[93] *See* MURPHY, *supra* note 83, at 46–47 ("In the studios' view, all program formats potentially represent some future revenue source.").

[94] *Id.* at 88–89.

[95] *Id.* at 90 (noting that approximately forty-eight local television news collections exist in the U.S., most of which have acquired their collections by donation or solicitation as opposed to off-air recording, and that, combined, have over eleven thousand obsolete videotapes to copy).

[96] *See id.* at 57. The report noted:

> [T]he state of the nation's local television news collections remains in reality extremely desperate. Local archives have acquired television collections without the necessary resources to care for them. As [a] result, several deplorable conditions typify the state of most of these collections: Insufficient staff for processing thousands of small film clips or rolls, thus inhibiting access and preservation work. Nonexistent or idiosyncratic finding aids compiled at local stations usually without the benefit of professional librarians, again inhibiting research access. Use of originals and lack of reference copies, risking permanent damage. Lack of intermediate copies or protection copies. Lack of professionally trained technical staff. No local television news archive indicated the availability of cold storage facilities for color film originals, and only a small number indicated low humidity storage, below 40%, for film and videotape.

Id.

slate of studies[97] in connection with the current review of media ownership regulations[98] includes analyses that would seem to rely upon data that would be difficult, if not impossible, for a researcher to obtain with any depth, rigor, or assurance of accuracy. One of the Commission's studies was initially described as an effort to "analyze the effect of ownership structure and robustness . . . on various measures of the quantity and the quality of different types of TV programming, including local news and public affairs, minority programming, children's programming, family programming, religious programming, and violent and indecent content."[99]

Addressing issues of programming quality is particularly challenging in the absence of access to the actual content. Efforts to evaluate quality without engaging the actual content have produced some very unconvincing reasoning in recent FCC work. The current FCC-sponsored media ownership study addressing the issue of content quality employs a measure of the quality of a television program derived from the total minutes of commercial time contained within the original broadcast.[100] In this study, a program with fewer commercial minutes is rated higher in quality than a program with more commercial minutes, under the assumption that commercials diminish viewers' enjoyment of the program.[101] The usefulness of these ratings is diminished by the fact that the opposite hypothesis is no less plausible: higher quality programming might permit greater freedom to insert commercial minutes into the program, given audiences' possible greater engagement with, and appreciation of, the program (and thus greater willingness to endure commercials). The measurement of content quality will always be subject to disagreements over methods and criteria, but, at present, such efforts consistently take place at a significant distance from the programming itself.

Analysis of what *can* be measured rather than what *should* be measured is a chronic problem in contemporary communications policy research, and a significant reason for the over-reliance of policymakers on certain kinds of tractable analysis, such as industry competition models. It also makes poorly framed assumptions seem like necessary compromises. For example, the aforemen-

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[97] *See* FCC Seeks Comment on Research Studies on Media Ownership, *Public Notice*, MB Docket No. 06-121, at 1 (July 31, 2007), http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A1.pdf.

[98] *See* Broadcast Ownership Further Notice, *supra* note 29.

[99] FCC Names Economic Studies to be Conducted as Part of Media Ownership Rules Review, *Public Notice* (Nov. 22, 2006), *available at* http://fjallfoss.fcc.gov/edoc_public/attachmatch/DOC-268606A1.pdf.

[100] *See* CRAWFORD, *supra* note 69, at 2 ("[W]e measure program quality by the number and length [in minutes and seconds] of advertisements included on that program.").

[101] *Id.* ("This captures the idea that the more advertisements included in a program, the less enjoyable it is to viewers to watch that program.").

tioned quality study focused primarily on broadcast television, neglecting the obvious importance of cable, satellite, and increasingly, the Internet in the production and dissemination of content. The FCC is, of course, not ignorant of this larger landscape and of the diminishing role of broadcasting within it, but it maintains no comprehensive data on cable, satellite, and Internet system ownership or content.[102] In the case of the minority ownership study, the limited FCC data necessitated the use of commercial data sources, providing another instance of divergence between commercial needs and public policy research needs.

In the absence of archival resources, many policy-oriented analyses of media content rely primarily on commercially-produced program schedules, formats, or play list databases. [103] Some of the recently released FCC media ownership studies have maintained this methodological approach.[104] While such metadata sources can dramatically reduce the time and labor associated with certain types of research questions, they provide limited or no opportunity for evaluating the way these sources classify certain programs, such as distinctions between news and entertainment, or children's and adult programming. Given their unavoidably superficial nature, such metadata also are generally inadequate for investigating questions about content quality and substance that increasingly are being asked in the policy arena.[105]

The FCC's recent study of television stations' provision of minority-targeted programming offers an example of these limitations. As the study's author noted, the commercially available program schedule data were "very useful for some program types, however . . . less useful for others (e.g., Minority Programming)."[106] Consequently, in order to assess the availability of this type of programming, the study made a number of simplifying assumptions, such as categorizing all programming on minority-targeted networks (e.g., Black Entertainment Television) as minority-targeted programming. The author de-

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[102] *See id.* at 3 n.4.

[103] *See* JAMES T. HAMILTON, CHANNELING VIOLENCE: THE ECONOMIC MARKET FOR VIOLENT TELEVISION PROGRAMMING 20–30 (1998); SPAVINS ET AL., *supra* note 69, at 2 (utilizing commercially available television program schedule data to assess the quantity of broadcast news and public affairs programming); WILLIAMS ET AL., *supra* note 71 (utilizing commercially available radio station play list data to assess the diversity of music offerings in broadcast radio); Michael Zhaoxu Yan & Philip M. Napoli, *Market Competition, Station Ownership, and Local Public Affairs Programming on Broadcast Television.* 56 J. OF COMM. 795, 800–04 (utilizing commercially available television program schedule data, market data, and ownership data to assess the relationship between market and ownership conditions and the availability of local public affairs programming on television).

[104] *See*, e.g., CRAWFORD, *supra* note 69, at 7–8 (utilizing television program schedule data); SHIMAN, ET AL., *supra* note 27, at III-1,-3 (utilizing radio station format data).

[105] *See* CRAWFORD, *supra* note 69, at 2–4.

[106] *Id.* at 12.

scribed this approach as "unfortunately crude . . . as some programming offered on other . . . networks clearly targets minority audiences."[107] Another such assumption involved categorizing any programming that included the words "Spanish" or *"Pelicula"* in its description of program type or category as minority programming.[108] Certainly, such methods are imprecise at best, but they are common when attempting to adapt commercially-produced programming databases to the growing range of content-related issues that have become central to communications policy goals.[109]

III. ACCESS TO DATA

The problems of incomplete or inadequate data collection are compounded by poor access to existing data. Especially difficult to access, in the current environment, are commercial datasets used in public policy.[110] The situation is paradoxical in many respects, marked by greater demand for data on the part of researchers and policymakers, with greater capacity to collect and disseminate data via new technologies, but much more restricted access to these new data streams.

The FCC has not been idle in this area, and currently maintains a number of freely accessible online databases, including the aforementioned collection of Form 398 reports for educational children's television programming,[111] statistical data on indecency complaints and indecency actions,[112] and data on telephony charges, usage, and service provider performance,[113] among others. For reasons that are not clear, the majority of these datasets relate to telecommunications industries and service providers, rather than to media industries and media outlets. Yet, the FCC is inconsistent in its approach to the disclosure of data, and in many cases acts to restrict access both to the "public" data it collects and to the "private" data it licenses in the course of publicly-funded research. With some important exceptions, the FCC contributed to the current circumstances, in which its core data needs can be met only on highly restrictive terms, effectively shielding policy research from public scrutiny. At times,

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[107] *Id.* at 13.

[108] *See id.*

[109] Similarly, imprecise or vague categorizations of Children's Programming, Family Programming, and Indecent Programming are employed in this study as well. *See id.*

[110] *See* Napoli & Seaton, *supra* note 1 at 321–22.

[111] *See* FCC, KidVid Public Access, *supra* note 75.

[112] *See* Obscenity, Indecency & Profanity: FCC Actions, http://www.fcc.gov/eb/oip/Actions.html (last visited Nov. 16, 2007).

[113] *See* FCC, Wireline Competition Bureau Statistical Reports, http://www.fcc.gov/wcb/iatd/stats.html (last visited Nov. 16, 2007).

the FCC has also extended this treatment to the publicly-collected data that it deemed commercially sensitive. Such deference to commercial interests in data collection and disclosure is a recurring tension in FCC data policies, and one that works in opposition to its statements regarding the need for an open and rigorous research culture to support policymaking.

The larger problem, however, is not FCC inconsistency in this area, but rather restricted access to the commercial datasets that often provide the sole sources of information concerning important dimensions of public life, from media industry structure, to programming audiences, to content, to Internet traffic. Because access to such data is governed by commercial contract rather than copyright policy, researchers cannot resort to a claim of fair use. Since datasets are priced for corporate use, researchers outside the employ of media companies are generally priced out of the data market, and have little or no market power with which to negotiate better terms. Because there is little or no competition among commercial data providers, and because providers engage in extensive price discrimination, there are no rules, norms, or markets that shape pricing. Pricing, therefore, is widely perceived as arbitrary.[114] In many cases, moreover, the data provider is not an independent company such as Nielson, Arbitron, and BIA, but the communications or media company itself. This is especially true in the areas of telecommunications and Internet service provision, where advertising has not generated a secondary data collection industry. The adversarial nature of communications policymaking further complicates and distorts the research process, determining who can access commercial data and on what terms.[115]

A. Problematic Non-Disclosure of Data

There are several different contexts in which the nondisclosure of data can become a problem—some more troubling than others—and each resolvable through a resort to different kinds of administrative, regulatory, or even normative solutions. This discussion distinguishes between three major contexts here: (1) that of unambiguously 'public' data collection, such as industry reporting requirements managed by the FCC; (2) that of commercial data used in public research, as in the recent media ownership studies; and (3) that of commercial

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[114] Napoli & Seaton, *supra* note 1, at 296–97.

[115] The Social Science Research Council has begun an effort to encourage voluntary loosening of terms by private providers for public policy research purposes, but this effort has been hampered by the broader, longer term, and federally-encouraged commoditization of data resources, which has greatly diminished the culture of openness and disclosure on which scientific research culture depends. *See* Media Research Hub, http://mediaresearchhub.ssrc.org (last visited Nov. 16, 2007).

or other private data used in third-party research submitted in formal policy proceedings. In all cases, the intersection between public policy and private inputs is poorly defined, and increasingly contested by both public interest advocates and industry groups. It seems likely that demands for scrutiny of the data used in policymaking will grow, and that FCC inconsistencies in this area will be forced to give way to clearer policies of data access and accountability.

1. Taking Public Data Private

One of the more easily addressed constraints on research at the FCC involves the deliberate withholding of data collected *by* the FCC in the course of its standard reporting processes. Recent controversy surrounding the release of data related to Form 477 ("Local Telephone Competition and Broadband Reporting") provides a good example. Form 477 is collected from telecommunications service and broadband providers in an effort to gauge the extent of local competition and telecommunications service, and the extent of broadband availability across the United States.[116] This reporting includes detailed information on the types and numbers of lines and wireless channels provided by telecommunications service providers,[117] and is gathered at the zip code level. That is, respondents submit a list of zip codes in which they serve at least one customer. It is a basic dataset for developing broadband and Internet access policies—a crucial issue for the FCC as telecommunications and media services converge on the Internet.

The Commission has emphasized the need for wide access to this data, noting that "public availability allows consumers and experts the opportunity to review the data to ensure the accuracy of the information."[118] Further, the Commission stated "by allowing public release of as much of the information as possible, associations, scholars, and others will be able to use the information in their independent analyses of Commission policies, thereby aiding the Commission in crafting regulations that address specific market problems and eliminating those regulations that have outlived their usefulness."[119]

Despite these statements, and despite the important controversy created by the GAO's analyses of the findings regarding local broadband competition, the

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[116] *See* 2000 Data Gathering Report, *supra* note 20, ¶ 1 (adopting rules and a standardized form to collect "basic information about two critical and dynamic areas of the communications industry: the development of local telephone service competition and the deployment of broadband services"); *see also* 2004 Data Gathering Report, *supra* note 20 (extending the reporting requirements and gathering more granular data from service providers).

[117] *See* 2000 Data Gathering Report, *supra* note 20, at app. B.

[118] *Id.* ¶ 86.

[119] *Id.* ¶ 96.

FCC has been hesitant to make this dataset available.[120] In 2006, the Center for Public Integrity, a nonpartisan public interest organization, filed a Freedom of Information Act ("FOIA") request to compel release of the dataset.[121] The Commission denied the request on the grounds that: a) the information falls within FOIA exemptions regarding commercially sensitive data; and b) the Center for Public Integrity failed to present a compelling public interest reason for disclosure of the information.[122] Even accepting the second ground, the Commission could have responded by separating out the data it deemed commercially sensitive. Instead, it denied access to the dataset in its entirety.[123]

Similar issues of data confidentiality have arisen in regard to the FCC's treatment of data on the gender and ethnicity of the employees of broadcast and cable outlets—specifically in relation to the possible reinstatement of Form 395, which gathers detailed demographic information from individual broadcast and cable outlets.[124] Although the data from Form 395 was made public during the thirty years in which it was initially required,[125] this public status has become an obstacle as the issue of whether information identifying individual broadcast and cable outlets should be redacted is addressed.[126] This proceeding has remained unresolved for the past three years, producing a growing gap in the Commission's data, and diminishing the value of the Commission's longitudinal tracking of these issues.[127]

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[120] *See* Letter from Kirk S. Burgee, Associate Bureau Chief, Wireline Competition Bureau, FCC, to Drew Clark, Sr. Fellow and Project Mgr., Center for Public Integrity (Sept. 26, 2006), *available at* http://www.publicintegrity.org/docs/FCCReplytoFOIA.pdf.

[121] Complaint for Declaratory and Injunctive Relief, Center for Public Integrity v. FCC, No. 06-1644 (D.C. Cir. Sept. 25, 2006), *available at* http://www.publicintegrity.org/docs/ComplaintFCC.pdf.

[122] Letter from Kirk Burgee to Drew Clark, *supra* note 120.

[123] Letter from Peter Newbatt Smith, Research Editor & Counsel, Center for Public Integrity, to General Counsel, FCC (Oct. 19, 2006), *available at* http://publicintegrity.org/docs/telecom/telecomfoia/admin_appeal.pdf.

[124] *See* 2004 Cable EEO Report, *supra* note 52, ¶ 1.

[125] *Id.* The FCC noted:

> Broadcasters have filed Form 395-B, the Broadcast Station Annual Employment Report, with the Commission for more than thirty years. Throughout the form's long history, the Commission has made it available to the public for inspection. . . . MVPDs have for years filed an Annual Employment Report on FCC Form 395-A, which unlike its broadcast equivalent, is required by statute to be made available for public inspection at the MVPD's central office and at every office where five or more full time employees are regularly assigned to work.

Id. (citations omitted).

[126] *Id.* ¶¶ 15–17.

[127] At this point, the FCC has not gathered information on the gender and ethnicity of broadcast and cable outlet employees for eight years. Assuming that, at some point, the Commission reinstates this data gathering activity, there will of course be an irresolvable gap in the Commission's hiring data that extends from 2000 through whatever year the

2. Private Data in Public Research

In 2002, the FCC took a significant but incomplete step toward transparency with regard to its own research outputs by making the underlying data for studies commissioned in relation to its media ownership proceedings (mostly) available online for download and (re)analysis.[128] The commercial, proprietary status of some of the data used in these studies created complications, however, and some of the data were made available only on a computer terminal physically located at the FCC, with no copying or printing of the data allowed.[129] These restrictions were part of the license negotiated by the FCC with the data provider in the course of its contracted research. These conditions were imposed on FCC staff as well as outside researchers, and made it nearly impossible for researchers to do more than spot check the data.

The FCC's broadcast localism proceeding,[130] initiated in the wake of the FCC's 2003 media ownership decision,[131] resulted in a similar dilemma. Georgetown University's Institute for Public Representation ("IPR") submitted a FOIA request for:

> all studies and/or proposals for studies, reports, analytical assessments, and factual data gathered or compiled after July 1, 2003, by the FCC or by outsiders under contract with the FCC, which relate in any way to the localism initiatives announced in August 2003 . . . or to the Commission's media ownership rules.[132]

In response, the FCC made available a range of draft documents, supporting research, solicitations, proposals, and contracts, as well as sound recordings and spreadsheets.[133] Approximately 1400 pages of internal Commission records were withheld, however, on the grounds that they contained confidential commercial information (including copyrighted materials) or because they

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Commission ultimately begins gathering these data again.

[128] *See In re* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets, *Protective Order*, 17 F.C.C.R. 22,178, ¶¶ 4–5 (Nov. 4, 2002).

[129] *Id.* ¶¶ 6–7, 9.

[130] *See In re* Broadcast Localism, *Notice of Inquiry*, 19 F.C.C.R. 12,425, ¶ 1 (June 7, 2004).

[131] *See In re* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13,620 ¶ 1 (June 2, 2003) [hereinafter 2002 Media Ownership Report].

[132] Letter from Michael S. Perko, Chief, Office of Commc'ns & Indus. Info., FCC, to Marvin Ammori, Inst. For Pub. Representation, Georgetown Univ. Law Cent., at 1 (Jan. 4, 2007) (on file with author); *see also* John Eggerton, *FCC Releases, Withholds Ownership Documents*, BROAD. & CABLE, Jan. 5, 2007, *available at* http://www.broadcastingcable.com/article/CA6404744.html.

[133] Letter from Michael S. Perko to Marvin Ammoni, *supra* note 132, at 2–3.

were reflective of the agency's deliberative process (which is subject to a FOIA exemption).[134] Seven hundred pages of this material were identified as spreadsheets and memoranda derived from proprietary data sources such as BIA Research and Warren Communications, for which access was restricted by the underlying commercial licenses.[135] Again, primary inputs to policy were made effectively off limits.

More recently, the FCC made most of the data underlying its ten 2007 media ownership studies available online.[136] Once again, licensing restrictions led to selective withholding of data, making it impossible to evaluate a number of statistical claims in the reports. The Commission's study of Ownership Structure and Robustness of Media, for example, developed what it described as "one of the largest datasets ever assembled concerning ownership and the media."[137] However, the authors noted that licensing restrictions on some of the data led to a release of only "a smaller set of data at both the DMA and station, system, and newspaper levels."[138] Many of the central variables created for the database were withheld, including outlet revenues, outlet owner revenues, parent company revenues, audience shares, and minority ownership.[139]

As was the case in 2002, the Commission subsequently made available the proprietary components of the data on a more limited basis, allowing interested parties to access and analyze the data on-site at the FCC, but not to copy or remove any portions of the data from the public access computer terminals on which the data were located.[140] However, licensing restrictions associated with Standard and Poor's financial data for radio companies led the Commission to

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[134] *Id.* at 4–7.

[135] *Id.* ("The factual data in this category are either derived from or copied wholesale from copyrighted databases or publications owned by sources other than the Commission. The Commission obtained this data pursuant to agreements that generally limit the agency's ability to distribute or disclose the information to outside sources.").

[136] FCC, Research Studies on Media Ownership, http://www.fcc.gov/ownership/studies.html (last visited Nov. 9, 2007) (providing the data sets utilized in connection with the FCC's 2007 media ownership studies).

[137] *See* DUWADI ET AL., *supra* note 39, at 3.

[138] *Id.*

[139] *See id.* at 20–23.

[140] *See In re* 2006 Quadrennial Review—Review of the Commissioner Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-121; 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Cross-Ownership of Broadcast Stations and Newspapers, MB Docket No. 01-235; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MB Docket No. 01-317; Definition of Radio Markets, MM Docket No. 00-244, *Protective Order* (Sept. 5, 2007), http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3741A1.pdf.

withhold the data set related to one of the FCC's studies on the radio industry.[141]

It is fundamental that when a government agency conducts or commissions research in connection with a regulatory proceeding, the underlying data should be made available to the public for independent scrutiny and reuse. This is especially crucial in highly adversarial research contexts like that of the FCC, in which access to resources can become a sharp differentiator of access to data. The FCC and other government agencies have fostered a situation in which this principle of accountability is routinely inoperative.[142]

3. Third Party Research and Data

Most of the research utilized by the FCC is not FCC-produced or commissioned, but submitted by third parties such as researchers, advocacy groups, media companies, and professional associations, in the course of comment periods during FCC proceedings.[143] Although the submission process for comments requires that these studies be made available to the public on-line, the data underlying submitted studies have not been subject to disclosure requirements. This creates obvious difficulties in scrutinizing the studies, both by other stakeholders in the proceedings and by the FCC itself. While conducting independent research that relies heavily upon commercial data sources, the researchers themselves are usually contractually prohibited from disseminating or disclosing the data, even if the party submitting the study were inclined to

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[141] *See id.* at 2 n.5 ("Certain financial data provided by Standard and Poor's ("S&P") relating to radio companies is not being made available due to disclosure restrictions. Accordingly, the author-created data set that incorporated S&P data has been redacted").

[142] *In re* 2006 Quadrennial Review—Review of the Commissioner Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-121; 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Cross-Ownership of Broadcast Stations and Newspapers, MB Docket No. 01-235; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MB Docket No. 01-317; Definition of Radio Markets, MM Docket No. 00-244; Ways to Further Section 257 Mandate and to Build on Earlier Studies, MB Docket No. 04-228, *Second Further Notice of Proposed Rule Making*, at 31 (Aug. 1, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-136A1.pdf (joint statement of Comm'r Michael J. Copps and Comm'r Jonathan A. Adelstein approving in part, dissenting in part).

[143] *See* JOHANNES M. BAUER, SUNGJOONG KIM, BELLA MOODY & STEVEN S. WILDMAN, THE ROLE OF RESEARCH IN COMMUNICATIONS POLICY: THEORY AND EVIDENCE 10–11 (2004), *available at* http://www.quello.msu.edu/research/FORD01/ICA2005.pdf (illustrating the important role that external stakeholders play in introducing research ideas into the policymaking process).

make the underlying data freely available.[144] In reality, of course, parties submitting research to the FCC typically are submitting the research in support of a particular policy position, and may in fact not be inclined to subject their research to third-party scrutiny and analysis.

This propensity not to submit underlying data is coming under increasing pressure from stakeholders and advocates involved in the communications policymaking processes. In 2006, EchoStar Satellite, a Direct Broadcast Satellite provider, argued in court that the Administrative Procedures Act[145] requires that any data relied upon by the FCC (or any other federal agency) in its decision-making must be made available in the public record.[146] In this case, the company sought access to broadcast signal strength data that the FCC used in its determining broadcast signal transmission rights[147] under the Satellite Home Viewer Improvement Act of 1999.[148] These data were not submitted in raw form, but rather were analyzed in an engineering report submitted to the FCC by the National Association of Broadcasters and the Association for Maximum Service Television.[149] The FCC argued that "EchoStar was not entitled to the data because the Commission itself neither had nor relied upon them when it issued its final rule. Rather, the Commission based its analysis upon the description, methodology, and results of the study contained in the public comments."[150] The FCC's perspective begs the question of whether relying upon a *study* utilizing a particular data set is different from relying upon the *data* analyzed within that study. Superficially, this would appear to be a dubious ground on which to deny access to data—if indeed access to policy data is required by statute. Unfortunately, the United States Court of Appeals for the District of Columbia did not address EchoStar's argument regarding its right to access the data, on the grounds that EchoStar did not request the data until after the Commission had issued its final decision.[151]

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[144] Napoli & Seaton, *supra* note 1, at 309.

[145] Administrative Procedures Act, 5 U.S.C. § 553 (2000).

[146] EchoStar Satellite v. FCC, 457 F.3d 31, 39 (D.C. Cir. 2006).

[147] *See In re* Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations, *First Report and Order*, 15 F.C.C.R. 12,118, ¶ 14 (May 22, 2000).

[148] Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-523.

[149] *See In re* Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations, *Engineering Statement in Support of Comments*, ET Docket No. 00-11, at 1 (Feb. 22, 2000) (accessible via FCC Electronic Comment Filing System).

[150] *EchoStar Satellite*, 457 F.3d at 38.

[151] *Id.*

A related issue arose recently in connection with the FCC's ongoing media ownership proceeding. The Smaller Market Broadcasters Coalition filed a comment arguing that it was entitled to see data underlying a study cited in comments filed by Consumers Union, the Consumer Federation of America, Free Press, and the Office of Communication of the United Church of Christ.[152] The study in question was an academic research paper presented at a conference by two University of Michigan scholars.[153] The Smaller Market Broadcasters Coalition took issue with some of the findings in the paper involving the relationship between duopoly ownership of television outlets and the provision of local news and public affairs programming.[154] It argued that the study "should not be given any consideration until the underlying data are placed on the record and the public has had an opportunity to evaluate those data and comment on the Study."[155]

EchoStar and the Smaller Market Broadcasters Coalition identified the same need for access to underlying data, but differed significantly in the boundaries they proposed. Echostar requested access to the data underlying a study *conducted and submitted* by the NAB and its partners. On the other hand, the Smaller Market Broadcasters Coalition requested access to the data underlying a study *cited* by Consumers Union and its partners—a study they neither conducted nor funded, and which was not submitted to the FCC. Consumers Union and partners did not have access to Yan and Park's data. Moreover, Yan and Park would likely be in violation of their commercial data license if they chose to release it. The Smaller Market Broadcasters Coalition request reached beyond the formal comment process and implicated the practice of citation and independent research in general. The burdens placed on parties filing com-

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[152] *In re* 2006 Quadrennial Review—Review of the Commissioner Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-121; 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Cross-Ownership of Broadcast Stations and Newspapers, MB Docket No. 01-235; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MB Docket No. 01-317; Definition of Radio Markets, MM Docket No. 00-244, *Coalition Request for Underlying Data*, at 1–2 (Dec. 7, 2006) (accessible via FCC Electronic Comment Filing System) [hereinafter Coalition Request for Data].

[153] MICHAEL ZHAOXU YAN & YONG JIN PARK, DUOPOLY OWNERSHIP AND LOCAL INFORMATIONAL PROGRAMMING ON TELEVISION: AN EMPIRICAL ANALYSIS (2005), *available at* http://web.si.umich.edu/tprc/papers/2005/488/tprc2005_yan.pdf.

[154] *See* Coalition Request for Data, *supra* note 152, at 2 ("There is reason to believe that the underlying data do not support the conclusions drawn from it by Consumers Union et al., and that the Study is otherwise flawed.").

[155] *Id.*

ments in this scenario would be completely insurmountable and would ultimately chill the usage of research in policy advocacy.

Formal inclusion in a policymaking process, however, should be the threshold requirement for application for rules on data disclosure. Such rules must encompass not only FCC-conducted or commissioned studies, but also outside research submitted in agency proceedings. In all cases, meaningful access to data must include access to any commercial datasets used in the study. Effective data disclosure would likely require two types of action in this context: (1) rulemaking by the FCC to require the disclosure of data submitted in formal policy proceedings; and (2) an accompanying shift in the licensing terms used by data providers to permit disclosure in public policy contexts.

B. Scarcity of Data

As in other areas, scarcity of data on media content is compounded by problems of accessibility. Efforts by the FCC to require stations to make even their rudimentary, licensee-required data regarding programming, available online (in addition to onsite) have encountered substantial resistance from industry and from some FCC Commissioners.[156] Rulemaking on this issue remains incomplete, despite the Commission acknowledging that "members of the public have encountered difficulties accessing information under existing procedures."[157]

Researchers attempting to work directly with media content confront additional problems that extend beyond the FCC's jurisdiction. For instance, current copyright law presents major obstacles. A recent case study chronicles efforts to obtain the news footage and television episodes associated with the controversy that erupted in 1992, following Vice President Dan Quayle's public criticisms of the television program *Murphy Brown* and its lead character.[158] The study detailed:

> [R]econstruction of the . . . primary source materials proved effectively impossible, despite extensive and prolonged efforts. The speech by Dan Quayle that initiated the controversy was inaccessible for reasons of copyright, and the owner of the Murphy Brown episodes refused to provide them for educational use. Other news and entertainment footage was difficult to find, expensive, or unavailable.[159]

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[156] *See* Disclosure Requirements Notice, *supra* note 72, ¶ 29.

[157] *Id.* ¶ 1.

[158] Jeff Ubois, *Finding Murphy Brown: How Accessible are Historic Television Broadcasts?* 7 J. DIGITAL INFO. (2006), *available at* http://journals.tdl.org/jodi/article/view/jodi-177/155.

[159] *Id.* at 8.

As with private control of data collection, private control of video archives grants enormous discretionary authority to private interests—even in cases in which research on these materials would clearly fall under "fair use" exceptions to copyright law.[160] Had Ubois possessed a copy of the materials (from his own recordings of the broadcasts, for example), he would have been able to make his derivative analyses and assertions of fair use. In that case, the burden of challenging a research-related or educational use claim would fall upon the copyright holder. Without access, the negotiation of those boundaries never takes place. It is also worth noting that Ubois was fortunate that he knew who held the copyrights on the desired materials. Because there is no registry of copyrights, and because copyrights are both transferable and often multiple with respect to audio/visual works, it is often impossible to ascertain ownership.[161]

In a corporate environment marked by the commercialization of media archives, media outlets are frequently uncooperative to researchers in providing access to relevant content data, even in contexts unrelated to copyright concerns.[162] The cost and labor associated with accessing, reproducing, and transferring relevant content can become an issue, as can the reluctance among media outlets to aid researchers whose work might eventually be used against them in adversarial policymaking proceedings.[163] Additionally, more rigorous archiving of news content may increase the libel costs that news outlets face, given that, "[t]here is a difference between an error aired once in a local market and the same error widely and permanently available over the Internet. The more widely distributed an error, the greater the liability."[164] Because of these issues, the current structure of access provides industry with substantial veto power over academic or public policy research agendas.

This is relevant especially in the context of efforts to independently monitor and analyze media content, which have frequently been used to advocate policies or regulatory actions that run counter to the interests of regulated indus-

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[160] Fair use allows copyrighted material to be used "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research" without infringing upon the copyright of the work. 17 U.S.C. § 107 (2000).

[161] *See* LAWRENCE LESSIG, FREE CULTURE 222–23 (2004).

[162] *See* Ubois, *supra* note 158, at 13 (noting issues such as costs, labor, technological compatibility, and political and legal considerations that limit the extent to which content providers cooperate to fulfill the needs of the research community).

[163] *See* Meredith McGehee, *TV Stations Asleep at the Wheel*, BROAD. & CABLE (Dec. 18, 2006), *available at* http://www.broadcastingcable.com/article/CA6400562.html?display=Opinion (describing the broadcasting industry as having "fought tooth and nail to prevent greater disclosure and information gathering about what TV stations actually put on the air").

[164] *See* Snider, *supra* note 92, at 113.

tries.[165] Such independent monitoring efforts encompass a wide range of content areas, including news and public affairs, violent programming, children's programming, and indecent programming.[166] Often, the inaccessibility of robust content archives requires researchers to adopt less comprehensive methodological approaches, thereby making such research vulnerable to external criticism and potentially less potent in influencing policy decision-making.

One of the ironies is while print media are relatively well-archived and sufficiently accessible to facilitate systematic research (via widely used and accessible electronic data sources), electronic media are not. Legal scholar Lawrence Lessig asks, "[w]hy is it that the part of our culture that is recorded in newspapers remains perpetually accessible, while the part that is recorded on videotape is not? How is it that we've created a world where researchers trying to understand the effect of media on nineteenth-century America will have an easier time than researchers trying to understand the effect of media on twentieth-century America?"[167]

IV. TOWARD A FEDERAL DATA AGENDA FOR COMMUNICATIONS POLICYMAKING

As this article illustrates, many of the basic questions that policymakers, courts, and stakeholders pose regarding communications policy cannot be answered due to the poor quality, scope, and accessibility of policy-relevant data. The result is the frustrating scenario in which the studies that are conducted are subjected to withering methodological critiques—and thus frequently discredited[168]—while little effort is made either to produce better data or to ensure easier access to existing datasets. This situation undermines the extent to which research can effectively inform public policymaking. Some of these problems are challenging and require legislative efforts or a significant rethinking of the

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[165] *See* MILLS, *supra* 87, at 27.

[166] *See, e.g.*, CHILDREN NOW, BIG MEDIA, LITTLE KIDS: MEDIA CONSOLIDATION & CHILDREN'S TELEVISION PROGRAMMING (2003), *available at* https://publications.childrennow.org/assets/pdf/cmp/big-media-little-03.pdf (monitoring children's programming on television); Erika F. Fowler, Kenneth M. Goldstein, Matthew Hale & Martin Kaplan, *Does Local News Measure Up?* 18 STAN. L. & POL'Y REV. 410 (2007) (monitoring local television news); PARENTS TELEVISION COUNCIL, TV BLOODBATH: VIOLENCE ON PRIME TIME BROADCAST TV (2003), *available at* http://www.parentstv.org/PTC/publications/reports/stateindustryviolence/ReportOnViolence.pdf (monitoring levels of violence on broadcast network television).

[167] *See* LESSIG, *supra* note 161, at 111.

[168] *See, e.g.*, McGehee, *supra* note 163 (describing an example in which the data-gathering methodology of a University of Wisconsin study was severely criticized by broadcasting industry, while at the same time the industry continued to resist efforts by the FCC enhance the accessibility of programming-related data).

FCC's research role in order to solve. Others are modest and simple to address, provided the FCC and other relevant actors choose to act. This section offers the beginnings of a concrete agenda for change.

A. Internal Data Collection

Communications policy analysis would benefit substantially if the FCC more rigorously managed its existing reporting requirements. The collection of such information is a core part of the FCC's responsibility to monitor the state of the industries under its watch. Shortcomings in FCC-collected data are a self-inflicted blow to its policymaking capabilities, and cover a wide range of policymaking areas.

The FCC must devote more resources to the efficient and reliable gathering and processing of existing data. As this article demonstrates, policy advocates and researchers have identified significant problems with the reporting and analysis of Form 323 (dealing with ownership), Form 395 (dealing with minority employment), and Form 477 (dealing with broadband deployment). These problems must be addressed before such reporting can be considered reliable. The Commission should also more aggressively enforce compliance with reporting requirements by licensees. Improved compliance goes hand-in-hand with better data processing. Increased sanctions should be considered for organizations that fail to provide complete or accurate information in these regards.

In addition to revamping and enforcing its current data collection methods, a comprehensive data agenda necessitates that the FCC expand those efforts as well. In several areas, the full exercise of the FCC's regulatory responsibilities seems to require only modest additions to its data collection practices. These additions could dramatically increase the quality of research inputs for policymaking. This recommendation echoes those made almost ten years ago by the Clinton Administration's Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, which emphasized that "[e]ffective self-regulation by the broadcast industry in the public interest requires the availability to the public of adequate information about what a local broadcaster is doing."[169] At that time, however, industry members of the Committee expressed resistance to the expansion of any mandatory reporting requirements by broadcasters.[170]

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[169] ADVISORY COMMITTEE ON PUB. INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCASTING FUTURE 45 (1998), *available at* http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf.

[170] *See id.* at 80 (noting that in a separate statement, broadcast industry executives and

High priority must be given to gathering comprehensive information on the financial state of the outlets under the FCC's jurisdiction. Revenue data, in particular, must be better gathered by the Commission, given the policy importance that not only the FCC, but also Congress, the Justice Department, and the Federal Trade Commission accord the analysis of competition within individual communications markets. The fact that policymakers do not possess comprehensive information on the financial status of individual media outlets and media markets makes it virtually impossible for the Commission to apply its own preferred analytical frameworks to policy decisions. Reliance on commercial sources for such data is inadequate because the methods of gathering and reporting such data are susceptible to marketplace demands (and to shifts in these demands) and because the voluntary nature of participation in such data-gathering enterprises can lead to significant data gaps.[171] In addition, reliance on commercial sources raises issues of sufficient data accessibility. Revisiting earlier FCC policies requiring financial statements from broadcast licensees[172] would be a logical first step in improving accessibility. To adequately account for the industries under FCC jurisdiction, such requirements would have to expand beyond broadcast licensees. To the extent that the Securities and Exchange Commission ("SEC") already collects useful financial data about media organizations as part of its broader regulatory authority, it would seem logical to explore the SEC as a data-gathering avenue or to consider possible collaborative initiatives between the FCC and the SEC.

The regulated industries frequently object that such reporting reveals commercially sensitive information. Such claims must be assessed against the availability of comparable data from commercial sources. There is little logic, for instance, to the argument that revenue data are commercially sensitive, and therefore protected from federal data gathering efforts, if such data are, for the most part, readily available (for a substantial price) via commercial data providers.

Advisory Committee Members, Robert W. Decherd, Harold C. Crump, and William F. Duhamel state that they "do not believe that it is necessary or appropriate for the FCC to impose specific additional recordkeeping or reporting requirements").

[171] *See supra* notes 17–18 and accompanying text.

[172] *See* Webster, *supra* note 14, at 63. It is worth noting that in 1979, H.R. 5430 was introduced in the House of Representatives to amend the Communications Act of 1934 to require the FCC to collect certain financial information from commercial broadcast licensees and to make such information available for public inspection. *See* H.R. 5430, 96th Cong. (1979).

B. Internet-Based Services

The FCC is acutely aware that broadcasting and traditional telephony—the classic objects of its regulatory purview—represent a shrinking share of the total flow of media content and communications. America is rapidly entering an era in which the Internet is the dominant media and communications infrastructure. Shockingly, there is no systematic, publicly-available data on many basic aspects of this critical infrastructure, such as Internet traffic patterns, congestion, spam, phishing, and interconnectivity among Internet Service Providers ("ISP"). Organized public data collection ended in 1994, with the breakup of National Science Foundation Network and the emergence of commercial ISPs.[173] Commercial ISPs collect detailed information that could meaningfully inform research, but they currently have no regulatory obligation or, to date, independent willingness to share or aggregate such data, even in an anonymous form. Commercial data providers target individual Internet use, but few of them aggregate characteristics of Internet traffic. If there is to be effective regulation of media and communications, by the FCC or by other regulatory bodies, this data gap will need to be closed.[174]

C. Content Archiving

Media content archiving is increasingly important to communications policy research, and is in need of dramatic improvements. The FCC can play a constructive role here, although a more comprehensive solution to archiving and access will almost certainly require action at other levels of government, such as changes to copyright law, or expansion of the mandate of the Library of Congress. As the FCC looks ahead toward the challenges of communications policy in the next decades, it would be well served to begin such dialogues with other agencies.

It is within the FCC's authority to require broadcast licensees to provide a tangible, accessible, and reliable record of station programming and performance. A return to the era of detailed program logs would be one possible element of such a shift. Such materials should be available to the public online and, perhaps preferably, be submitted to the FCC for verification and aggregation into a publicly available master data set. The FCC began to move (somewhat tentatively) in this direction in 2000 by initiating proceedings on the re-

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[173] OFFICE OF LEGISLATIVE & PUB. AFFAIRS, NSF FACT SHEET (2003), http://www.nsf.gov/od/lpa/news/03/fsnsf_internet.htm.

[174] *See, e.g.*, Cooperative Association for Internet Data Analysis Home Page, http://www.caida.org (last visited Nov. 9, 2007) (providing research and support materials to help navigate developing Internet issues).

porting requirements of broadcast licensees,[175] yet this proceeding has languished for seven years. The Commission must revisit this issue concerning the mechanisms by which such data should be made available to the public.

An appropriate longer-term goal is the establishment of a centralized content archive in which all FCC licensees are required to annually deposit some representative sample of their content output in order to facilitate the outlet-level and market-level analyses that are becoming increasingly important in policy-making. A great deal of cross-market and longitudinal analyses of programming practices could be accomplished with even a modest, randomly-constructed sample of programming. A more ambitious solution would aim for the complete content archive of all programming. This possibility is already within technical reach at relatively modest cost.

The regulatory authority to mandate a more comprehensive archiving agenda is already present, as is the appropriate federal infrastructure for handling a larger archiving enterprise. The American Television and Radio Archives Act established the American Television and Radio Archives within the Library of Congress for the purpose of preserving "a permanent record of the television and radio programs which are the heritage of the people of the United States and to provide access to such programs to historians and scholars."[176] While this archive is relatively strong in the areas of primetime network television programs and PBS content, it is not a robust archive for the content output of individual radio and television broadcast licensees across the United States.[177] It certainly has the potential to take on this role, and a coordinated effort by the FCC and the Library of Congress could realize the archive's potential, and make an enormous contribution to American culture. At a more technical level, it would lead to a dramatic improvement in the FCC's ability to address policy issues surrounding media content. The diminishing costs of digital storage capacity make such an initiative increasingly affordable. Moreover, at the most basic level a reasonably thorough local television news archive could be generated simply by archiving the closed-captioned feed that accompanies television programs.[178] This closed-captioning activity (required

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[175] *See* Disclosure Requirements Notice, *supra* note 72, ¶ 1.

[176] American Television and Radio Archives Act § 113, Pub. L. No. 94-553, 90 Stat. 2601 (1976).

[177] *See* MURPHY, *supra* note 83, at 8–9 (noting that the Library of Congress possesses "the entire output of National Educational Television and its successor, the Public Broadcasting System; all of NBC's extant entertainment programs; the main network evening news transmissions—through an arrangement with Vanderbilt University" but that "the most devastating losses" have taken place at the level of local television stations").

[178] *See* Snider, *supra* note 92, at 111 ("By far the least expensive record of local news to archive is the closed-captioned feed that accompanies TV programs.").

by the Telecommunications Act of 1996)[179] means that the costs of transcription, digitization, and synchronization of programming already are being incurred by programmers.[180]

Today, broadcast news providers do not operate under the same requirements as the print media, which must deposit copies of their material to the Library of Congress in order to receive a copyright to that material.[181] Extending this requirement into the realm of the electronic media seems perfectly appropriate,[182] particularly in light of the migration from print to electronic media that is taking place within the realm of both media consumption and production/distribution.

D. Third-Party Data

The FCC needs more robust policies regarding quality assessment and access to data with respect to studies submitted by third parties. It also needs stronger policies regarding the commercial data sources utilized directly by the Commission. The Data Quality Act requires government agencies to develop procedures and standards for addressing issues related to the quality of data used in agency decision making.[183] The FCC responded to the Act by issuing a set of Information Quality Guidelines in 2002, which stated its commitment "to ensuring that all data it disseminates reflect a level of quality commensurate with the nature of the information. Further, the Commission seeks to disseminate all its data as broadly and promptly as possible. This commitment applies to all data and information disseminated by the Commission."[184]

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[179] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 126–127; *see also In re* Close Captioning and Video Description of Video Programming, *Report and Order*, 13 F.C.C.R. 3272, ¶ 1 (Aug. 7, 1997).

[180] *See* Snider, *supra* note 92, at 112 ("The closed-captioning provisions of the Telecommunications Act suggest that an economic feasibility analysis of local TV news archives can ignore the costs of transcription, digitalization, and synchronization. These are sunk costs that local TV stations must pay whether or not they provide archives.").

[181] *Id.* at 113 ("U.S. copyright law stipules that a quid pro quo for receiving a copyright is depositing a copy of the work in the Library of Congress for public use . . . . But local TV broadcasts are partially exempt from this law; blanket demands for TV news records are illegal.").

[182] *Id.* ("If, as argued, news archives are a public good, Congress should eliminate this exemption and give the Librarian of Congress the right to request Internet deposit of news, including closed captions.").

[183] Data Quality Act § 515, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153 (2000).

[184] *In re* Implementation of Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554, *Information Quality Guidelines*, 17 F.C.C.R. 19,890, 19,891 (Oct. 4, 2002) [hereinafter *Information Quality Guidelines*].

A critical feature of the Commission's interpretation of the Act is that it applies only to "reports prepared for Congress or required by legislation."[185] This language aligns the Data Quality Act with the Data Access Act,[186] which provides the public with the right to access data produced with government funding, although there are significant caveats.[187] Among the many areas the FCC believes the Data Quality Act does not apply to are:

> public filings, subpoenas, or adjudicative processes; non-scientific/non-statistical general, procedural, or organizational information; information that is not initiated or sponsored by the Commission; information that expresses personal opinions rather than formal agency views; information for the primary use of federal employees (inter- or intra-agency), contractors, or grantees; responses to requests made under the Freedom of Information act, the Privacy Act, the Federal Advisory Committee Act, or similar laws; agency correspondence; archival records; trade secrets, intellectual property, confidential data or information; and non-routine or emergency public safety information.[188]

This list effectively excludes much of the research and data on which the FCC relies for its policymaking, including third-party, publicly-filed research. The FCC interpretation keeps the Data Quality Act at a distance from much of the actual process of policymaking. In fact, it is not clear that this interpretation would apply even to its recent rounds of commissioned research on media ownership (despite the precedent it set in providing access to the data underlying the first round of studies in 2002). The media studies were commissioned as contracts, not as grants. This technicality circumvents the strict letter of the Data Quality Act, which was conceived primarily to address federally-funded grant competitions for laboratory-based science.

The FCC's position was challenged by the Center for Regulatory Effectiveness ("CRE"), the primary watchdog organization associated with the Data Quality Act.[189] The CRE recently filed comments in the FCC's media ownership proceeding arguing that "[a]ll of the data used or relied on by the Commission, whether developed internally, by agency contractors, or by independent third-parties, will need to adhere to applicable Data Quality standards."[190]

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[185] *Id.* at 19,897.

[186] Data Access Act, Pub. L. No. 105-277, 112 Stat. 2681-495 (1998). For a discussion of the Data Access Act and its implementation see generally NAT'L RESEARCH COUNCIL, ACCESS TO RESEARCH DATA IN THE 21ST CENTURY (2002).

[187] *See* Donald T. Hornstein, *Accounting for Science: The Independence of Public Research in the New, Subterranean Administrative Law*, 66 LAW & CONTEMP. PROBS. 227 (2003); Napoli & Seaton, *supra* note 1, at 328.

[188] *Information Quality Guidelines*, *supra* note 184, at 19,897.

[189] The Center for Regulatory Effectiveness, Regulatory Action of the Week, http://www.thecre.com/quality/20040607_regweek.html (last visited Nov. 9, 2007).

[190] *In re* 2006 Quadrennial Review—Review of the Commissioner Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-121; 2002 Biennial Regulatory Review—Review of the Commis-

According to the CRE, "[t]he FCC will need to apply OMB and Commission Data Quality standards to all substantive data submitted by commenters. The Commission is only able to use and rely on third-party information that fully complies with Data Quality standards."[191] Moreover, petitions claiming that information disseminated by the Commission has failed to meet applicable data quality standards "may be filed against FCC-developed information or against FCC information that is based on third-party materials."[192]

Indeed, the CRE used the Data Quality Act to challenge research associated with the FCC's media ownership proceeding. They recently submitted a letter to the FCC asserting that one of the Commission's studies on the relationship between television station ownership characteristics and the provision of local news programming[193] does not meet the data quality standards established by the FCC and the OMB.[194] The CRE argued that because the study in question "[d]efines localism using an arbitrary and non-replicable methodology; measures localism using a biased protocol; and does not provide its underlying data," the FCC cannot rely upon the data in its policymaking.[195]

A number of assessments of the Data Quality Act suggest that it was designed and utilized to facilitate targeted attacks on scientific research that might undermine deregulatory policy agendas.[196] The focus of the CRE's filing with the FCC supports such an interpretation. The CRE has trained its analytical lens on what is essentially the only study produced within the FCC that

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sion's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Cross-Ownership of Broadcast Stations and Newspapers, MB Docket No. 01-235; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MB Docket No. 01-317; Definition of Radio Markets, MM Docket No. 00-244, *Comments of The Center for Regulatory Effectiveness*, at 1 (Dec. 8, 2006) (accessible via FCC Electronic Comment Filing System).

[191] *Id.* at 4.

[192] *Id.*

[193] PETER J. ALEXANDER & KEITH BROWN, FCC, DO LOCAL OWNERS DELIVER MORE LOCALISM? SOME EVIDENCE FROM BROADCAST NEWS (2004), *available at* http://www.fcc.gov/ownership/materials/already-released/doownersdeliver070004.pdf.

[194] Letter from Jim Tozzi, Member, Bd. of Advisors, Center for Regulatory Effectiveness, to Rodger Woock, Dir. and Chief Info. Officer, Info. Tech. Ctr., FCC, at 9 (May 3, 2007) (on file with author) ("As the following analysis demonstrates, the study does not meet the Commission's information quality standards and, therefore, it cannot be relied upon and used by the Commission.").

[195] *Id.* at 18.

[196] *See* Former Nixon/Regan Administration Official Tells FCC to Deep-Six Localism Study Once More, http://www.lasarletter.net/drupal/node/396 (May 4, 2007, 23:44 MST) ("In practice, say critics, the [Data Quality Act] has allowed the Bush administration and industry lobbyists to second guess and even block necessary environmental and product safety regulations.").

presents results that undermine the Commission's perceived predisposition toward relaxing its media ownership rules.[197]

This is not to say that the Data Quality Act, or other possible legislation in a similar vein, might not be able to significantly improve the data environment for communications policymaking and policy analysis. Like the CRE, advocacy groups such as Free Press, the Consumer Federation of America, and Consumers Union, have applied the Data Quality Act to the media ownership proceedings—though in this case in an effort to enhance access to *all* of the data underlying *all* of the studies produced by the Commission in connection with the proceeding.[198] These groups argue that, under the Data Quality Act and the OMB Guidelines written in response to the Act, the Commission "must provide the public with the underlying data and sufficient time to reproduce the results of the studies and to perform sensitivity analyses."[199] Certainly, such a policy of making the data underlying government-conducted or -funded research that is used in policy decision-making publicly accessible would seem to reflect the kind of transparency and accountability that legislation such as the Data Quality Act is meant to foster.

Further, the inclusion of public comments under the Data Quality Act would lead to a more realistic discussion of quality assessment and access to data in FCC policymaking—one that would also likely require a more robust internal process of verification and review of *all* research used in policymaking decisions.[200]

Because so much of the policy analysis and review process at the FCC is externalized through the comment process, a commitment to data quality would also require a more substantive discussion about access to the data underlying

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[197] The Alexander & Brown study served as the centerpiece for a recent controversy involving the possible suppression by the FCC of research containing results that did not support the relaxation of media ownership regulations. Specifically, the study was never made public until apparently being leaked by an FCC staff member to the office of Senator Diane Feinstein, who in turn confronted FCC Chairman Kevin Martin with the study during a Senate hearing and demanded an explanation as to why the study was not made public along with the various other studies that the FCC had conducted in association with its review of the media ownership regulations. *See* John Dunbar, *Spiked Study Leads to New FCC Query*, WASH. POST, Jan. 25, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/01/25/AR2007012501054_pf.html.

[198] *See In re* 2006 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, *Complaint Under the Data Quality Act of Free Press, Consumer Federation of America, Consumers Union*, MB Docket No. 06-121 (Sept. 11, 2007), *available at* http://www.freepress.net/docs/fp_cfa_cu_complaint_under_dqa.pdf.

[199] *See id.* at 10.

[200] Urs Gasser, Information Quality and the Law, or, *How to Catch a Difficult Horse* 10 (Nov. 2003), *available at* http://cyber.law.harvard.edu/home/uploads/291/2003-08.pdf.

third-party submissions. Because so much of the data are governed by commercial licenses that restrict or forbid secondary dissemination, third-party submitters are often legally enjoined from disclosing their data. This creates a basic obstacle to review, both for external commenters and the FCC, and it also poses a challenge to the quality and accountability of policymaking at the FCC. If the Commission is to continue to rely on external data collection and an adversarial comment process, it should require: (1) any study submitted by a commenting party to a Commission proceeding be accompanied by the associated underlying data; and (2) such data to be made available for analysis by other interested parties.[201] This would require an accompanying process of rethinking commercial licensing practices to permit less restrictive terms of disclosure for public policy purposes.

E. Advisory Committee on Data Quality, Integrity, and Access

Because the issues of data and its uses in communications policymaking are complex and evolving, a Federal Advisory Committee on Data Quality, Integrity, and Access should be created. Such a committee would be comprised of FCC personnel, industry representatives, academic researchers, and members of the public interest and advocacy communities. This committee would be charged with establishing specific baseline standards for the Commission's data needs, as well as with assessing the quality and integrity of the various data sets relied upon not only by the Commission, but also by the various external stakeholders that submit research to the Commission in individual proceedings. Such a committee would also engage in regular systematic inventories and assessments of the various forms that the FCC solicits from the organizations under its regulatory authority, as well as continue to improve the accessibility of relevant data. The Committee would then make recommendations to the Commission regarding data gathering needs, processes, and access policies. This work would also resuscitate the stalled 2000 proceeding on reporting requirements,[202] and create a stronger basis for the FCC to consider the future of the communications arena and its role in ensuring a vibrant and participatory public sphere.

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[201] As has been suggested in other discussions of the data access issue, accessibility to underlying data could potentially be governed by some sort of "need to know" provision that includes a filtering provision to limit access to qualified parties with a demonstrated stake in the decision outcome, as well as limitations in terms of how the data are used. *See* NAT'L RESEARCH COUNCIL, *supra* note 186, at 14.

[202] *See* Disclosure Requirements Notice, *supra* note 72, ¶ 1.

V. CONCLUSION

This article outlined the range of deficiencies that currently exist related to the availability and accessibility of data sources that are central to communications policymaking. This article also put forth the beginnings of a federal data agenda for communications policymaking that provides necessary first steps to making the contemporary data environment more conducive to effective communications policy analysis and policy decision making. Looking ahead, further exploration into the legal, legislative, institutional, and economic hurdles to the initiatives put forth in this article is necessary. Similarly, the practical implications of strengthening and implementing the proposals put forth in this article must be examined in greater detail. Nevertheless, as this article has tried to illustrate, the need for substantial improvement on this front is pressing. The technological revolution in communications and media is occurring without the capacity to map and understand that revolution. The status quo cannot support informed communications and media policymaking.