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FCC REGULATION AND OTHER OXYMORONS REVISITED

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In the early 1980s, long before assuming the Chairman's crown and scepter at the Federal Communications Commission ("FCC"), a youthful William Kennard co-authored a critical, tongue-in-cheek view of the agency's approach to policymaking.[3] Claiming that "the FCC rarely takes advantage of the 20/20 hindsight available to it, and, as a result, often stumbles through a haze of fuzzy thinking borne of its own past decisions,"[4] the article examined the following "antediluvian axioms" that had guided the Commission:

"Antediluvian Axiom 1:	Government Always Knows Best: The Cod Liver Oil Approach to Business Behavior
Antediluvian Axiom 2:	Bigness Is Always Bad, Or Less Is More
Antediluvian Axiom 3:	Act Now, Think Later: Sleigh Before the Reindeer Decision-Making
Antediluvian Axiom 4:	The Best Way To Cut Red Tape Is Lengthwise
Antediluvian Axiom 5:	When In Doubt, Mumble
Antediluvian Axiom 6:	The Best Technical Standard Is No Standard

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[1]Partner, Verner, Liipfert, Bernhard, McPherson and Hand ("VLBMH"), Washington, D.C.; B.A., Boston University, 1958; J.D., Harvard Law School, 1963; LL.M., Georgetown University, 1965. Caveat emptor: In the interest of full disclosure, readers are advised that Messrs. Krasnow and Kennard were colleagues at the National Association of Broadcasters and VLBMH. Also, the views and humor expressed in this article are those of the authors only.

[2]Law Clerk, VLBMH, Washington, D.C.; B.A., George Washington University, 1994; J.D., Catholic University of America, expected 2000.

[3] Erwin G. Krasnow, Harry F. Cole and William E. Kennard, *FCC Regulation and Other Oxymorons: Seven Axioms to Grind*, 5 HASTINGS COMM. & ENT. L.J. 759 (1983).

[4]*Id.*

Antediluvian Axiom 7: Raised Eyebrows Are An Uplifting Regulatory Gambit"[5]

Ever the diplomat, even as a young lawyer with the National Association of Broadcasters, our incipient Chairman did not simply throw the first stone and run. (Or, as is the case with this article and its predecessor, throw the first pun and run.) After poking fun at the FCC's vices, he and his coauthors offered the following axioms to guide the FCC as it entered a "new, uncharted era":

"Modern Axiom 1: Trust the Marketplace; Anything the Private Sector Can Do, the Government Can Do Worse.

Modern Axiom 2: Bigness Is In the Eyes of the Beholder: Less is Frequently Less.

Modern Axiom 3: Think Now, Act Later: Placing the Horse Before the Cart Makes for a Smoother Ride.

Modern Axiom 4: Suppress the Urge to Wrap Something Up with Paper and Tie It with Red Tape.

Modern Axiom 5: When in Doubt, Eschew Interim Authorizations and Complete the Rulemaking.

Modern Axiom 6: Failure to Adopt Technical Standards Is Tantamount to a Double Standard.

Modern Axiom 7: Concentrate on Being a Traffic Cop and Get Rid of the Vice and Morals Squad."[6]

The question now before us: Has the Kennard FCC of the '90s practiced what he preached in the '80s?[7] The answer: More faithfully than he is sometimes given credit for.[8]

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[5]*Id.* at 760-61.

[6]*Id.* at 777.

[7]While techo-prophets of the 1980's predicted a "technological explosion," no one could have envisioned all the nuances of the communications revolution at the end of the Twentieth century. So, while holding Chairman Kennard to "Modern Axioms" penned when Betamax was the hot new technological innovation may seem cruel and unusual punishment, the authors' intent is to see how the Chairman measures up to the spirit, rather than the letter of the axiom. The real question posed by the Modern Axioms is

Warring Axioms No. 1:
Government Always Knows Best vs. Trust the Marketplace

The superiority complex underlying Antediluvian Axiom 1 traces its origins to the FCC's early childhood. Created by Congress in 1934, the FCC historically embraced the mantra of that era: "government always knows best." New Deal agencies tended to fall into one of two categories: "deliver the mail" and "Holy Grail".[9] "Deliver the mail" agencies performed neutral, mechanistic tasks such as sending out Social Security checks, buying supplies and, yes, delivering the mail. "Holy Grail" agencies, on the other hand, were charged with furthering some grand moral or civilizing goal.

The Federal Radio Commission ("FRC"), precursor to the FCC, came into being in the intermediate pre-New Deal era primarily to "deliver the mail" -- to act as the traffic cop

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whether the content police of the analog age have become the "bit police" of the digital age. Or, is the Kennard FCC living up to MIT Professor and *Wired* Columnist Nicholas Negroponte's prediction that "the FCC is too smart to want to be the bit police. Its mandate is to see advanced information and entertainment services proliferate in the public interest." NICHOLAS NEGROPONTE, BEING DIGITAL 55 (1995).

[8]Behavior modification can be especially hard for bureaucratic institutions like the FCC which often subscribe to Peter's Bureaucratic Principle: "Bureaucracy defends the status quo long past the time when the quo has lost its status." LAURENCE J. PETER, PETER'S QUOTATIONS 83 (1977). John Berresford, an FCC attorney, has pointed out that while abolishing unnecessary regulations may sound easy, most regulations were promoted by powerful interests and, once they are adopted, other powerful interests figure out how to profit from them. As a result, "the deregulatory regulator often finds the regulated companies fighting with all their skills and perseverance to preserve regulation." John W. Berresford, *The Future of the FCC: Promote Competition, Then Relax*, 50 ADMIN. L. REV. 731, 757 (1998) Or, if one prefers a more folksy rendition:

> "[T]he purpose, you understand, is not to protect consumers from the malefactors of whatever line of work it is. It's to protect the folks already in that line of work from other folks who would like to muscle in on the action. Thus it is that the state is brought in to regulate the lawn-sprinkler installers, watch repairers, barbers, cosmetologists, and a plethora of other toilers and spinners, reapers and sowers, who would just as soon not have any more competition, thank you."

MOLLY IVINS, NOTHIN' BUT GOOD TIMES AHEAD 99 (1993).

[9]Taylor Branch, *We're All Working for the Penn Central*, WASH. MONTHLY, Nov. 1970, at 20.

of the airwaves in order to prevent harmful interference. But both the FRC and the FCC had a vague Holy Grail clause written into their charters: the requirement that they uphold the "public interest, convenience and necessity."[10] This classic catch-all phrase has enabled the FCC to be not only the airwaves' traffic cop, but its vice and morals squad as well.[11]

The FCC's quest for the Holy Grail in broadcasting in the 1960s and 1970s was particularly evident in the regulation of programming content, which included such minutiae as the precise method broadcasters had to follow in consulting members of their communities before formulating programming schedules ("ascertainment"), and the minimum amounts of nonentertainment programming a broadcaster had to air.[12] The Commission essentially told broadcasters how much time they could dedicate to

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[10]Communications Act of 1934, ch. 652, §§ 307, 309, 48 Stat. 1064 (codified as amended at 47 U.S.C.A. §§ 307, 309 (West 1991 & Supp. 1997)). Congress did not uniformly use the phrase "public interest" in the Communications Act. For example, the standard of "public interest" is specified in sections 201(b), 215(a), 319(c), and 315(a); "public convenience and necessity" in section 214(a) and (c); "interest of public convenience and necessity" in section 214(d); "public interest, convenience *and* necessity" in sections 307(c), 309(a), and 319(d); "public convenience, interest or necessity" in section 307(a); and "public interest, convenience *or* necessity" in section 311(b) and 311(c)(3) (emphasis added). In 1981, the FCC recommended that Congress drop all broadcast-related mentions of "convenience" or "necessity." It called the words "superfluous. . . . to the extent the issues embodied in these terms are relevant to radio regulation, they are subsumed under Commission review of the 'public interest.'" FCC Legislative Proposal, Track I, 25 (Sept. 17, 1981). Congress did not amend the Act as the FCC had proposed.

[11]*See* Erwin G. Krasnow and Jack N. Goodman, *The 'Public Interest' Standard: The Search for the Holy Grail*, 50 FED. COMM. LJ. 603 (1998). "'Public interest, convenience or necessity' means about as little as any phrase that the drafters of the [Radio] Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority," Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930). Former FCC Commissioner Ervin Duggan observed that "successive regimes at the FCC have oscillated wildly between enthusiasm for the public interest standard and distaste for it." Ervin S. Duggan, *Congressman Tauzin's Interesting Idea*, BROADCASTING & CABLE, Oct. 20, 1997, at S18. The self-proclaimed Thomas Jefferson of the digital revolution, Nicholas Negroponte, updated the antediluvian law enforcement metaphor of the FCC as the "Kilohertz Cop" by characterizing the Commission as the "bit police" of the digital age. Negroponte, *supra* note 5, at 51.

[12] *In Re* Ascertainment of Community Problems by Broadcast Applicants, *First Report and Order*, 57 F.C.C.2d 418 (1976).

commercials in any given hour and even decreed that certain commercials five minutes or more in length were *per se* against the public interest.[13] In the late 1970s and early 1980s, however, the FCC began to retreat from this position.[14] In the words of Commissioner Anne Jones, the time had come "to stop treating broadcasters like little children."[15]

Has the Kennard FCC let go of Antediluvian Axiom 1 and adopted Modern Axiom 1? The Chairman appears to recognize the frailty of the "government always knows best" mentality. In his view, "[a] business solution to a business problem is always better than a regulatory solution to a business problem."[16] As addiction counselors say, acknowledging the problem is the first step toward recovery.[17] And in many respects it has been a speedy recovery. Chairman Kennard has done much more than give lip service to proposing business solutions to business problems. In little over a year, the Kennard

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[13]*In Re* Applicability of Commission Policies on Program Length Commercials, *Public Notice*, 44 F.C.C.2d 985 (1974).

[14] The agency "deregulated" four aspects of the commercial radio and television industry by eliminating rules and policies concerning program logs, commercial time limitations, ascertainment of community problems, and nonentertainment programming requirements. *See In re* Deregulation of Radio, *Report and Order*, 84 F.C.C.2d 968 (1981); *In re* Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, *Report and Order*, 94 F.C.C.2d 678 (1983).

[15]Anne Jones, Remarks at a Meeting of the Federal Communications Commission (Jan. 14, 1981). In 1981, the Supreme Court, too, recognized that the marketplace, albeit imperfect, often results in greater diversity of program formats than can be achieved by the pronouncements of the FCC. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

[16]William E. Kennard, The New FCC, Address Before the Georgetown University Law Center Continuing Legal Education Seminar (Oct. 1, 1998) (text available at <http://www.fcc.gov/Speeches/Kennard/spwek830.html>).

[17]Chairman Kennard has recognized that as the marketplace changes, so must the FCC:

> "The top-down regulatory model of the Industrial Age is as out of place in the New Economy as the rotary telephone. As competition and conversion develops, the FCC must streamline its operations and continue to eliminate regulatory burdens. Technology is no longer a barrier, but old ways of thinking are."

William E. Kennard, *FCC Must Change for the High-Tech 21st Century*, THE HILL, Feb. 3, 1999, at 30.

FCC has adopted or is in the process of examining policies that allow the marketplace and individual consumers to determine their own destiny. One of the best examples of overcoming the "government knows best mentality" is the FCC's work with the telecommunications industry to adopt a set of practices designed to address cramming.[18] This initiative took less than six months and involved no new and burdensome regulations.[19] The Kennard FCC also facilitated an historic agreement on tower siting between local and state governments and the wireless industries.[20] The Kennard-brokered deal sets forth a list of "best practices" for industry and communities to use to work cooperatively when siting a tower; the deal also adopts an informal dispute resolution process. Other examples include privatization of ship inspections and certain aspects of the equipment certification process[21] and proposals to allow FM stations to enter into

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[18]In the spirit of "spamming" (the sending of large quantities of unsolicited e-mail) and "slamming" (switching a consumer's long distance provider without permission), "cramming" is yet another pithy term developed by The Committee That Sits In A Room and Thinks Up Pithy Terms (TCTSIARTUPT) to describe the annoying and unsavory things that some communications companies do to unwary consumers. "Cramming" refers to the inclusion of unauthorized, misleading or deceptive charges on a consumer's local telephone bill.

[19]The Kennard-induced guidelines include procedures for comprehensive advance screening of products being charged to local phone bills, telephone company scrutiny of service providers, verification of end-user approval of services being charged to bills, customer dispute resolution procedures, and other recommendations for preventing and eliminating cramming. These guidelines can be found at<http://www.fcc.gov/Bureaus/Common_Carrier/Other/cramming/cramming.html>. FCC and Industry Announce Best Practices Guidelines to Protect Consumers From Cramming, (*FCC News Release*) (rel. July 22, 1998)(available at <http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1998/nrcc8050.html>). The FCC also recently embarked on a "Truth-In-Billing" initiative that will require phone bills to be "clear and easy to read" and "nothing should be crammed onto them that you don't want or don't understand." William E. Kennard, Address Before the Consumer Federation of America Annual Conference (March 19, 1999) (text available at <http://www.fcc.gov/Speeches/Kennard/spwek912.html>).

[20]Chairman William E. Kennard Announces Historic Agreement By Local and State Governments and Wireless Industries on Facilities Siting Issues, (*FCC News Release*) (rel. Aug. 5, 1998) (available at <http://www.fcc.gov/Bureaus/Wireless/News_Releases/1998/nrwl8032.html>).

[21]In the Matter of Amendment of the Commission's Rules Concerning the Inspection of Radio Installations on Large Cargo and Small Passenger Ships, *Report and Order*, 13 F.C.C.R. 13,556 (1998).

interference agreements.[22] The Kennard FCC has thus far resisted the urge to regulate Internet access to cable -- the Chairman has taken the position that the Internet should continue to enjoy freedom from regulation so its development is not impaired.[23]

Warring Axioms No. 2:
Bigness Is Always Bad vs. Bigness Is in the Eyes of the Beholder

An age-old example of Antediluvian Axiom 2 may be found in the Commission's rules governing multiple ownership of radio and television stations. Borrowing the mind set of 19th Century Progressive Era American trust-busters, the FCC decided early on that the best way to foster competition and promote diversity was to minimize the number of media outlets any one individual or group could own. Fifty years ago, when few electronic media outlets existed, that approach made sense. But with the growth in the number of broadcast stations and the proliferation of cable television, cable networks, wireless cable, Direct Broadcast Satellites ("DBS"), the Internet, and a host of other services, such scarcity no longer exists. The proliferation of outlets and the convergence[24]

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[22]In the Matter of 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, *Notice of Proposed Rule Making and Order*, 13 F.C.C.R. 14849 (1998).

[23]Rather than acting as the all-knowing grandmother with a homeopathic cure for all ailments, the Kennard FCC has been careful to keep its regulatory doctoring of broadband technologies non-invasive. Doctor-in-charge Kennard stated upon FCC approval of the AT&T/TCI merger: "At this nascent stage in the development of the market, one should not presume to have a regulatory cure for every anticipated marketplace ailment. We must allow the marketplace to evolve." In the Matter of Applications for Consent to the Transfer of Control of Llicenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, *Statement of William E. Kennard, Chairman of the Federal Communications Commission*, CS Docket No. 98-178, FCC 99-24 (rel. Feb. 18, 1999).

[24]As one industry insider described it: "Convergence is that long-anticipated, often discussed puzzle about how the worlds of data and voice will turn out." Vance McCarthy, *Convergence with a Twist*, TELEPHONY, March 16, 1998 at 2. Puzzle appears to be the apt word. The meaning of convergence is often in the eyes of the beholder. One thing is clear, however, convergence is turning old ideas on their ears. One commentator described the current communications marketplace as "organized anarchy." Dom Serafini, *My Two Cents: Multimedia Convergence*, VIDEO AGE INTERNATIONAL, Oct. 1, 1998 at 1. Needless to say, the FCC finds itself wrestling with the fallout from this phenomenon every time it raises its regulatory wand. In the past months, the Commission has been forced to examine whether broadband Internet over cable should be regulated, and whether cable operators should be required to give

of communications technology have thrown a monkey wrench into the gears of conventional regulatory wisdom.[25]

At times, it appears that the Kennard Commission has adopted Modern Axiom 2, namely, "Bigness Is In the Eyes of the Beholder: Less is Frequently Less." Or, if the Chairman were penning the axiom today, he might say, in Clinton vernacular: "It's the Market Power, Stupid!"[26] The Kennard FCC's approval of the MCI/Worldcom,[27] AT&T/Teleport,[28] and AT&T/TCI[29] mergers suggest an agency that is open to

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access to those lines to other Internet providers.

[25]The authors are not suggesting that a chorus of violins should be played for the FCC but rather are pointing out that the spectrum allocation part of the Commission's mission is much thornier than it was just a few years ago. As Nicholas Negroponte pointed out:

> "In the analog days, the spectrum allocation part of the FCC's job was much easier. It could point to different parts of the spectrum and say: this is television, that is radio, this is cellular telephony, etc. Each chunk of spectrum was a specific communications or broadcast medium with its own transmission characteristics and anomalies, and with a very specific purpose in mind. But in a digital world, these differences blur or, in some case, vanish: they are all bits."

Negroponte, *supra* note 5, at 54.

[26]Chairman Kennard has said the key "to a pro-competitive, deregulatory" communications policy is competition rather than monopoly: "We must act to remove bottlenecks where the exercise of market power permits them to appear and we must maintain a competitive market structure. This means establishing interconnection standards and establishing the obligations, where necessary, of firms to extend services to others." Kennard, *supra* note 12.

[27]*See* In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., *Memorandum Opinion and Order*, 13 F.C.C.R. 18,025 (1998).

[28]*In re* Applications of Teleport Communications Group, Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services, *Memorandum Opinion and Order*, 13 F.C.C.R. 15,236 (1998).

[29]In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, *Memorandum Opinion and Order*, CS Docket No. 98-178, FCC 99-24 (rel. Feb. 18, 1999).

considering new models for the future.

In many ways, however, the agency has no choice. Technology appears to have commandeered the vehicle, locked the doors, and taken the FCC along for the ride.[30] Chairman Kennard and his colleagues are not passive riders on the journey.[31] The Chairman understands that it all boils down to market power: who has it, what increases it, and what makes it go away. While understanding that equation is a large part of navigating the "bigness versus smallness" debate, the real trick is figuring out how to make all this work for consumers. Regarded in some circles as a champion of the consumer, the Chairman knows how to make market power work for consumers.[32] In examining mergers, his focus has been on their pro-competitive potential, particularly as the marketplace evolves.[33] As he told a group gathered to discuss the AT&T/TCI Merger,

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[30]Dom Serafini observed that convergence is a force that no state can effectively control or legislate. Serafini, *supra* note 22. Just as one must never underestimate the power of Mother Nature, one must never underestimate the regulatory prowess of the FCC. But the advice Serafini gives regarding regulation and convergence appears to harmonize with Chairman Kennard's views. Serafini writes: "Artificial regulation cannot slow the pace of technological change, but can only modify the pace of consumer acceptance." *Id.* Chairman Kennard has repeatedly stressed his commitment not to thwart technology, while using the powers of the FCC to bring the benefits of those technologies to consumers. Maybe the FCC is finally learning the rules of the information superhighway: "If you're not part of the steamroller, you're part of the road." JULIA VITULIO, MARTIN MOSKIN & J. ROBERT MOSKIN, EXECUTIVE'S BOOK OF QUOTATIONS 109 (1994).

[31] "The issues involved in thinking about convergence and consolidation are complex ... Telephony is regulated one way, cable a second, terrestrial broadcast a third, satellite broadcast a fourth. As the historical, technological and market boundaries distinguishing these industries blur, the statutory differences make less and less sense. Maintaining them will likely result in inefficient rules that stifle promising innovations and increase opportunities for regulatory arbitrage."

Reauthorization of the Federal Communications Commission: Hearing Before the House Subcomm. on Telecommunications, Trade and Consumer Protection, 106th Cong. (1999) (testimony of William E. Kennard, Chairman, FCC).

[32]If former FCC Chairman Mark Fowler's slogan was "let the marketplace decide," Chairman Kennard's mantra seems to be "the public is my client." Doug Halonen, *Kennard Works to Put Stamp on FCC*, ELECTRONIC MEDIA, Nov. 9, 1998 at 1.

[33] "Deregulating communications services when consumers can choose the best combination of price, service and quality for their needs.

"[W]e know that these mergers create compelling benefits for the companies proposing them and their shareholders and executives but we need to know how average American consumers will be benefitted from these combinations ..."[34]

The FCC's ability to move beyond "Bigness is Bad" has been hampered by its failure to realize that when it comes to predicting the future, its crystal ball is cracked. Oliver Wendell Holmes stated this proposition more elegantly: "It cannot be helped ... [that] the law is behind the times."[35] Enter William Kennard with a mirror. In discussing the transition to digital television, he has been careful not to regulate based on one preconceived paradigm or another. He explained his modis operandi in dealing with DTV this way: "I think that those of us in government, here at the agency and in Congress, should have a certain amount of humility. We don't know exactly how this technology is going to best be used in the marketplace ... And that's OK. Because in the final analysis, there will be lots of digital business plans."[36] Humility may be just what the doctor ordered for regulating industries marked by technological obsolescence. Quite frankly, the Commission is in a situation akin to predicting the future of civil aviation based on the experience of the Hindenberg.

> This is the 'de-regulatory' part of the 'pro-competitive, deregulatory' approach. This means writing fair rules of competition, eliminating and discarding regulations no longer necessary (like we're doing in the Biennial Review currently underway,) and finding sensible ways to regulate non-competitive services that remain -- and having the wisdom to distinguish between the two."

Kennard, *supra* note 14.

[34]William Kennard, Statement at FCC En Banc Hearing on Telecom Mergers (Dec. 14, 1998) at 6 (text available at <http://www.fcc.gov/enbanc/121498/eb121498.html>).

[35]OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 231 (1921).

[36]*Steady As She Goes: FCC Chairman Bill Kennard and the Cool Approach to DTV*, THE DAWN OF DIGITAL TELEVISION (supplement), BROADCASTING & CABLE, Nov. 16, 1998. at S9. The Kennard Commission now appears to have the humility to admit its poor powers of prediction. This could help save it from falling into the trap of locking itself into one bad decision after another. A rolling stone may gather no moss, but it's also likely to indiscriminately obliterate everything in its path. As John Berresford put it, "Decisions that, with 20/20 hindsight, are revealed as wrong may compound themselves by provoking an attitude of 'I was right and, just to prove it, I'll make all other decisions illegal.'" John W. Berresford, *The Future of The FCC: Promote Competition, Then Relax*, 50 ADMIN. L. REV. 731, 768 (1998).

Warring Axioms No. 3:
Act Now, Think Later vs. Think Now, Act Later

In his journal article, young Kennard criticized the FCC for playing Santa Claus by rushing to hand out treats to new competitors in the marketplace. These impulsive displays of stocking stuffing often meant that the FCC did not stop to consider the consequences of its actions until it was too late. Often, the intended benefits were lost or got stuck on the roof.

A classic example of this axiom is low power television ("LPTV" or as the cognoscenti call it, "Toy TV"). In the late 1970s, the FCC decided to create a new broadcast service consisting of low powered television stations, intended to serve narrowly circumscribed areas, which would not interfere with existing, full power television stations.[37] But in a generous dash to hand out presents, the Commission announced that it would authorize "interim" LPTV operations pending the adoption of final allocation standards. The result was an institutional circus.[38] Applications languished in neat piles, finally inching out the door at a glacial pace once technical standards were established.[39] The technology did not prove to be the boon to competition that was expected. As far as gifts go, LPTV turned out to be akin to a fruit cake.

So, has the FCC turned into Grinch in the succeeding years, hardened by its past attempts at playing Kris Kringle? Well, it still promotes technology and entrepreneurship, but seems to have done a better job of adhering to Kennard's Third Modern Axiom: "Think Now, Act Later: Placing the Horse Before the Cart Makes for a Smoother Ride."

The best example of a process that has been turned around by the Kennard FCC is spectrum allocation and licensing, largely through changes necessitated by the 1993 and 1997 Budget Acts.[40] In the past few years, the Commission has repeatedly recognized

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[37]*See* Notice of Proposed Rule Making in BC Docket 78-253, 83 F.C.C2d 449 (1980). The Commission's decision to authorize interim operations, which occurred immediately prior to the 1980 elections, prompted speculation that there may be a connection between the two events. Krasnow, *supra* note 1, at 767.

[38]*See LPTV Complaints*, BROADCASTING, March 21, 1983 at 60.

[39]See *Report and Order* in BC Docket 78-253, 51 Rad. Reg. 2d (P&F) 476 (1982).

[40]Congress has recognized the the benefits of flexible use in spectrum allocation and codified many of those practices in the Communications Act as part of the Balanced Budget Act of 1997. Balanced Budget Act of 1997, Pub. L. No. 105-33 § 3005, 111 Stat. 251, 268 (1997). The FCC has embraced this spirit and rendered decisions which reflect a more enlightened philosophy toward spectrum management. *See In re*

that the public interest strongly favors flexible use; for example, when it adopted service rules for the 39 GHz bands, the Commission noted that "[i]t is in the public interest to afford licensees flexibility in the design of their systems to respond readily to consumer demand for their services, thus allowing the marketplace to dictate the best uses for this band."[41] Although Chairman Kennard inherited auctions from his predecessor Reed Hundt and the Commission began its movement toward more flexible policies prior to ascension, he has left his mark on the Commission's policies.[42] Perhaps the clearest symbol of the Commission's change in auction policy is reflected in the decor in the Chairman's office. Conspicuous by its absence is a certain $7 billion check that once adorned the walls when Reed Hundt was FCC auctioneer.[43]

For new, actionable services, the Commission routinely goes through the following steps before auction: allocation, the adoption of service and auction rules, and reconsideration.[44] This necessitates thinking before acting (i.e., licensing). Where this process has been rushed because of a statutory directive (e.g., Wireless Communications Services (WCS)), the results show the perils of acting without adequate time or flexibility

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Implementation of §6002(b) of Omnibus Budget Reconciliation Act of 1993, 12 F.C.C.R. 11,266 (1997).

[41]Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40 GHz Bands, *Report and Order*, 12 F.C.C.R. 18,6000, 18,633-34 (1997).

[42]Chairman Kennard has taken the position that the directive of Section 706 of the Telecommunications Act of 1996 to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," can be satisfied by "allocating large blocks of spectrum in ways that make them usable for any technically feasible service." *Three Years After Enactment of the Telecommunications Act of 1996: Hearing Before the Senate Comm. on the Judiciary Subcommittee on Antitrust, Business Rights and Competition,* 106th Cong. 10 (1999) (statement of William E. Kennard, Chairman, FCC). The Kennard FCC also recently adopted a Notice of Proposed Rule Making seeking comment on the scope of the Balanced Budget Act of 1997's change of FCC auction authority. The Notice seeks comment on how the Commission should balance the statutory mandate to assign licenses through competitive bidding with its public interest obligations. (*Notice of Proposed Rule Making*) (WT Docket No. 99-87, FCC 99-52) (rel. March 25, 1999).

[43]More than one observer has speculated that the check was removed after vandals snuck in and stamped it "Insufficient Funds". This tongue-in-cheek barb refers to the infamous "C-Block Crisis" where many winners of the C-block spectrum auctions overbid and found themselves unable to pay.

[44]*See* Proposals for Additional Spectrum, Relocation and Transition Mechanisms, *Memorandum Opinion and Order, Third Notice of Proposed Rulemaking and Order*, ET Docket 95-18 (rel. Nov. 19, 1998).

to think. The expansion of auctions to broadcast licenses will bring similar discipline to those licensing activities.[45] The Chairman's horse-before-the-cart approach is also illustrated in the FCC's decision to stay the effect of the rate integration rules for Commercial Mobile Radio Service (CMRS) long distance[46] and granting the forbearance request of the wireless industry with respect to number portability.[47] The Commission has also opened a rulemaking to look at eliminating the Commercial Mobile Radio Service (CMRS) spectrum cap.[48]

Conversely, the Kennard FCC has made considerable progress in abandoning Antediluvian Axiom 3. The Chairman has said on numerous occasions that regulatory flexibility is important to spurring competition and seems open to providing helpful rations to those who dare to venture into the wilderness of developing communications technology. However, in many ways, the FCC is like a large tanker and Chairman Kennard has been the pilot for only a short period of time. He has the hazardous chore

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[45]It is no small feat for the Commission to approach regulation in a such a rational, disciplined manner. A member of the staff of the FCC once said that the door to the Commission's meeting room should consist of a large mirror. When he entered that room, he explained, he felt as if he was entering *Through the Looking Glass* because what took place reminded him of something Lewis Carroll might have written. WILLIAM B. RAY, THE UPS AND DOWNS OF RADIO-TV REGULATION xv (1990).

[46]Generally rate integration requires interstate telecommunications companies to provide long distance services to their customers in each state at rates no higher than those they charge to their customers in other states. CMRS providers, such as cellular and Personal Communications Services (PCS) providers, serve customers using mobile phone units. The Commission's actions preserved these innovative and popular wide-are a calling plans that have encouraged greater use of CMRS services by many Americans. *See* In the Matter of Petitions for Forbearance, *Memorandum Opinion and Order*, CC Docket No. 96-61, FCC 98-347 (rel. Dec. 31, 1998).

[47]*See* In the Matter of Telephone Number Portability, *Second Memorandum Opinion and Order on Reconsideration*, CC Docket No. 95-116, RM 8535 (rel. Oct. 20, 1998)

[48]The CMRS spectrum cap, set out in Section 20.6 of the Commission's rules, restricts the amount of CMRS spectrum that an entity can have in a geographic area. Specifically, under the rule, no entity shall have an attributable interest in more than 45 MHz of licensed Personal Communications Service (PCS), cellular, or Specialized Mobile Radio (SMR) spectrum with significant overlap in any geographic area. The Commission is seeking comment on whether the CMRS spectrum cap in its current form continues to make economic and regulatory sense given the changes occurring in wireless telecommunications markets. *See* In the Matter of Cellular Telecommunications Industry Association's Petition for Forbearance from the 45 MHZ CMRS Spectrum Cap, *Notice of Proposed Rule Making*, WT Docket No. 98-205, FCC 98-308 (rel. Dec. 10, 1998).

of steering the vessel through breaking ice.[49]

Warring Axioms No. 4:
The Best Way To Cut Red Tape is Lengthwise vs. Suppress the Urge to Wrap Something Up with Paper and Tie It with Red Tape

It has been said that "pornography to a bureaucrat is a blank sheet of paper."[50] When Bill Kennard was an attorney fresh out of law school, the FCC was an award-winner when it came to prolific paperwork.[51]

Chairman Kennard has made serious efforts to trim unnecessary paperwork requirements. During his first year at the helm, one bureaucratic iceberg after another has been melted down to size through various "streamlining" rule makings. While technology and statutory directives have played a role in this simplification, it is no small accomplishment for this "New Deal dinosaur" to embrace new technology and use it in an efficient manner. The FCC has adopted clear rules and self-certification procedures coupled with audits and

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[49]Section 271 (the provision of long distance telephone service by the Regional Bell Operating Companies) and other provisions of the Telecommunications Act which open up various sectors of the communications industry mean the demise of the "lines of demarcation" of traditional forms of telecommunications. Also, the advent of digital television, satellites, cable and computers mean the demise of television as we know it. Coping with change is never easy, and when you throw in a Telecommunications Act that is schizophrenic at best -- it wants to maintain subsidies and universal service, but it wants competition -- things can get downright messy. To borrow a line from Henrik Ibsen's *An Enemy of the People*: "You should never wear your best trousers when you go out to fight for freedom and justice" -- or for competition in the communications marketplace. HENRIK IBSEN, AN ENEMY OF THE PEOPLE (R. Farquharson Sharp ed., Bantam Classic 1981) (1882).

[50]JAMES H. BOREN, THE BUREAUCRATIC ZOO: THE SEARCH FOR THE ULTIMATE MUMBLE 6 (1976).

[51]In the late 1970s, the General Accounting Office declared the FCC as the agency requiring the largest number of worker hours to fill out its forms and comply with its rules. During this same period, the Small Business Administration declared that the FCC took the prize for the agency with the largest number of forms and applications. Krasnow, *supra* note 1, at 769. In what might be considered a comment on the difficult reduction of paperwork by a government agency, comedian George Carlin penned the following under the category of Rules to Live By: "Never give up on an idea simply because it is band and doesn't work. Cling to it even when it is hopeless. Anyone can cut and run, but it takes a very special person to stay with something that is stupid and harmful." GEORGE CARLIN, BRAINDROPPINGS 218 (1997).

strong enforcement.[52] For example, it has made most application and comment filing processes available online. Obtaining information and retrieving documents at the FCC no longer produce Excedrin headaches.[53]

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[52]The streamlining orders adopted by the Kennard FCC include: electronic filing for wireless services, Amendment of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, 13 F.C.C.R. 21,027 (1998); streamlining cable and broadcast employment report, Amendment of Sections 73.3612 and 76.77 of the Commission's Rules Concerning Filing Dates for the Commission's Equal Employment Opportunity Annual Employment Reports, *Memorandum Opinion and Order*, 13 F.C.C.R. 6973 (1998); and streamlining cable television filing requirements, Streamlining of Cable Television Services Part 76 Public File and Notice Requirements, *Report and Order*, 13 F.C.C.R. 14,219 (1998). Streamlining proceedings still underway include: modification of accounting rules to reduce burdens on carriers, Review of Accounting and Cost Allocation Requirements, *Notice of Proposed Rule Making*, 13 F.C.C.R. 12,973 (1998); eliminating duplicative or unnecessary common carrier reporting requirements, Review of ARMIS Reporting Requirements, *Notice of Proposed Rule Making*, 13 F.C.C.R. 13,695 (1998); modification and elimination of Part 64 restrictions on bundling of telecommunications service with customer premises equipment, Notice of Propose Rule Making, 13 F.C.C.R. 21, 531 (1998); streamlining of AM/FM radio technical rules and policies, Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, *Notice of Proposed Rule Making*, 13 F.C.C.R. 14,849 (1998); streamlining of the Gettysburg reference facilities so that electronic filing and access can substitute for written filings and access, Amendments of Part 0 of the Commission's Rules to Close the Wireless Telecommunications Bureau's Gettysburg Reference Facility, *Notice of Proposed Rule Making*, 13 F.C.C.R. 17,967 (1998); and streamlining of Part 90 of the private land mobile services rules, *Notice of Proposed Rule Making*, 13 F.C.C.R. 21,133 (1998).

[53]*Deregulation: A Lawyer's Lament*, penned several years ago by CBS Corporation lawyer Mark Johnson, will give the gentle reader some insight into the state of mind of our brothers and sisters in the law:

> As we blithely consider proceeding
> With deregulation en masse
> Nobody's thought of the lawyers
> Who subsist on the present morass.
> When arcane comparative hearings
> Have been paying the partnership's bills
> It will not be an easy conversion
> to torts and divorces and wills.
> Plain language rules will be all that are left
> No "wherefores" and "hereins" and such

The unraveling of the FCC mummy has also included simplifying many administrative processes. For example, the Commission has adopted a Universal Licensing System for wireless services reducing the number of possible forms from 40 to 4 and blanket licensing for satellite downlinks.[54] It appears the Chairman is practicing the restraint he suggested for his predecessors in Modern Axiom 4: "Suppress the Urge to Wrap Something Up with Paper and Tie It with Red Tape."

Warring Axioms 5:
When in Doubt, Mumble vs. When in Doubt, Complete the Rulemaking

James H. Boren, author of *The Bureaucratic Zoo, The Search for the Ultimate Mumble*, once revealed the mantra of government bureaucrats: "When in charge, ponder; when in trouble, delegate; when in doubt, mumble."[55] The FCC is a master of the bureaucratic mumble -- or as some might say, doublespeak.[56] A recent example is the over-the-air reception device proceeding where Congress delegated to the FCC the task of crafting rules preempting state, local and private regulations that restricted the placement of

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Treasured old forms will be thrown on the fire
And for lunch we'll be forced to go Dutch.
So pity your struggling lawyer
Who has served at your side for so long
And write to your Congressman promptly
Saying that "deregulation" is wrong.

[54]In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.7 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, *Notice of Proposed Rule Making*, (FCC 98-235) (rel. Sept. 18, 1998).

[55]Boren, *supra* note 48, at 6. Boren also observed: "Bureaucratic eloquence consists of mumbling in forceful and resonant tones. That is, to speak with maximized effervescence of marginal thought patterns as interfaced with the viable options of nondirective interdigitation." Rd. at 34.

[56]Mumbling might be an apt characterization of the way Congress "spoke"in the Telecommunications Act of 1996. Even the Supreme Court has recognized the difficulty in comprehending what the Act is trying to say over the din of confusion and contradiction emanating from every page. Justice Scalia recently observed: "It would be a gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars." AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721, 738 (1999).

antenna and DBS dishes.[57] In 1996, the Commission answered only part of the question in an initial rulemaking.[58] The initial rule addressed homeowners, but left out how the rule applied to renters.

Presented with a complicated preemption question and an arguably ambiguous statutory mandate, the Commission did its best to craft a workable policy. But the result was a rule and an explanation that mumbled more often than the Fat Albert character Mush Mouth.[59] Consumers who just wanted to watch Seinfeld were instead playing semantic games with homeowner's associations over what constituted an "exclusive use area", "unreasonable" and in some cases even an "antenna".[60] The Commission was bombarded with complaints from frantic consumers who had paid a king's ransom for a dish that their homeowners association now prohibited. Many more consumers found themselves deciphering an explanation of the rule akin to Tweedledee's explanation of logic.[61]

On Kennard's watch, however, the second part of the rule was finally issued.[62] And, upon

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[57]Telecommunications Act of 1996, § 207, Pub. L. No. 104-104, 110 Stat. 114 (1996).

[58]In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, *First Report and Order*, 11 F.C.C.R. 19, 276 (1996).

[59]47 C.F.R. 1.4000 (1997).

[60]The rule resulting from the *First Report and Order* still allowed for restrictions on antenna placement as long as the restrictions met a three prong-test which was about as easy to figure out as the Sunday New York Times Crossword Puzzle. Needless to say, several Petitions for Reconsideration were filed and the agency commenced with a reconsideration of the rule. The Commission finally issued the *Order on Reconsideration* in 1998 (two years later). In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, *Order on Reconsideration*, 13 F.C.C.R. 18,962 (1998). The following Bureaucratic Law provides an apt description of the antenna placement proceeding: "Running a project in this office is like mating elephants -- (A) it takes a great deal of effort to get on top of things; (B) the whole affair is always accompanied by a great deal of noise and confusion, the culmination of which is heralded by loud trumpets; (C) after which, nothing comes of the effort for two years." PETER DICKSON, THE OFFICIAL RULES 22 (1978).

[61]"Contrariwise," continued Tweedledee, "If it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic." LEWIS CARROL, THROUGH THE LOOKING GLASS (AND WHAT ALICE FOUND THERE) 198 (1946).

[62]*Order on Reconsideration, supra* note 56.

reconsideration, the rules of the road are now easier to understand.[63] Although parties on both sides of the issue complain that the final rule is the proverbial rooster straddling the fence, its crow is clearer.

Chairman Kennard seems to be heeding the advice given by private citizen Kennard in Modern Axiom 5: "When in Doubt, Eschew Interim Authorizations and Complete the Rulemaking."[64] Indeed, if the Chairman could revise this Modern Axiom to reflect his philosophy, he might write: "Speak Clearly, and Carry A Big Stick". In this case, "the big stick" is a strong resolve -- in particular, a regulatory approach based on clearly stated rules, reliance on self certifications of compliance and in order to assure compliance, random audits and substantial penalties for noncompliance. This concept is best exemplified by the Kennard FCC's "zero tolerance" approach to "slamming" (the unauthorized switching of a subscriber's long distance carrier)[65] and the "streamlining" orders that greatly reduced the number and length of Mass Media forms, and the move to increased self-certification.[66] The Kennard FCC has instituted a Rocket Docket for

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[63]*See* In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, *Second Report and Order*, 13 F.C.C.R. 23,874 (1998).

[64]The decision in the *Second Report and Order* is being appealed both to the U.S. Court of Appeals for the D.C. Circuit and at the Commission by parties holding both schools of thought on the subject. While the rule was not necessarily what either side wanted, at least everyone now knows what exactly it is they are upset about. After languishing for two years under the predecessor FCC, the Kennard administration was able to complete the rule making and interject a little straight-talk into the debate.

[65]*See* in the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 – Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Report and Order and Further Notice of Proposed Rulemaking, 13 F.C.C.R. 23,056 (1998). The Kennard FCC has imposed $13 million in fines for slamming, including the first slamming fine of over $1 million and for the first time, the agency revoked a carrier's license to provide interstate telephone services because of slamming abuses. In addition, the Commission has adopted rules empowering consumers to protect themselves against telephone companies which have illegally switched their long distance carrier. William E. Kennard, Thinking Like a Consumer, Remarks before the 1999 AARP National Legislative Council Meeting, Feb. 4, 1999 at 3.

[66]*See* In the Matter of 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, *Report and Order* (rel. Oct. 22, 1998).

common carrier complaints that has resulted in expedited settlements of disputes[67] and also plans to establish an Enforcement Bureau to ensure clarity and expedition in the administration of FCC rules.[68]

Warring Axioms No. 6:
The Best Technical Standard Is No Standard vs. Failure to Adopt Technical Standards Is Tantamount to a Double Standard

"Government doesn't solve problems; it subsidizes them," Ronald Reagan once said.[69] In the past, the FCC has often lived up to this statement when considering technical standards for an emerging technology. While not directly financing public problems, the Commission's lack of leadership in setting technical standards has essentially subsidized the swirl of chaos around a new technology on numerous occasions. This head-in-the-sand routine has made it an accomplice to numerous consumer disasters. Faced with clear data suggesting the need for a technical standard in order for a technology to be used effectively by consumers, the agency looks up with huge bovine eyes and then returns to chewing its regulatory cud and emitting regulatory waste.

A classic tale of Antediluvian Axiom 6 is the case of AM stereo. The FCC was confronted with five stereo systems, none of them immediately compatible. Rather than endorsing one of the systems (or a composite system), the Commission announced some loose standards, concluded that all five systems met those standards, and washed its hands of the matter[70].

The problematic nature of Antediluvian Axiom 6 is that it represents the ne'er-do-well counterpart of the no-more-desirable Antediluvian Axiom 1 ("Government Always Knows Best"). In a Commission that not only clings to the past but also takes excess to an art form, it is a forgone conclusion that giving up Antediluvian Axiom 6 usually means taking up Antediluvian Axiom 1. In other words, it's all or nothing. Rather than giving just the amount of regulation that is needed to get things started, the Commission is like the overbearing relative that stays to help with the arrival of a newborn baby. They say they are there to help you settle in and get things ready, but before you know it, they've named

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[67]William Kennard, The Telecom Act at Three: Seeing the Face of the Future, Remarks at Comptel 1999 Annual Meeting and Trade Exposition (Feb. 8, 1999) (text available at <http://www.fcc.gov/Speeches/Kennard/spwek905.html>).

[68]*Supra* note 14.

[69]RONALD REAGAN, THE COMMON SENSE OF AN UNCOMMON MAN: THE WIT AND WISDOM OF RONALD REAGAN 97 (1989).

[70]*Final Rule*, 47 FR 13,152 (1982).

the child, rearranged the furniture, put you on a diet, canceled your magazine subscriptions, determined that you're doing everything wrong and given away the family pets.[71]

Although a respectable body of thought and law supports the idea that the FCC should not get in the way of the marketplace, there is an equally solid argument that some bedrock technical matters cannot be solved by the marketplace. For example, while traditional areas of FCC regulation -- such as content restrictions -- should yield to marketplace forces, other areas, such as enacting standards to ensure compatibility among digital television ("DTV") components, are of such importance to ensuring the success of the medium that the Commission should be actively involved. Leaving DTV technical standards to marketplace forces is akin to turning off the traffic lights in the middle of the rush hour. But that is not to say that the FCC must dictate every technical detail from atop Mount Olympus. The cure for Antediluvian Axiom 6 is not for the FCC to become the Federal Standard-Setting Commission, but rather to serve as the tie that binds industries together in creating standards. In order to ensure that new technology serves consumers, the FCC must ensure that *some* standards are set. The Kennard Commission has tried to traverse this regulatory chasm by encouraging and facilitating the gathering of private sector interests to set standards, using the agency's power to mandate only as a last resort.[72]

In the recent past, the FCC has served more as the tie that binds industries together in creating standards, than as the actual standard-setter. The approach of the Kennard Commission has been to encourage and facilitate the gathering of private sector interests to set standards, using the agency's power to mandate only as a last resort. For example,

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[71]P.J. O'Rourke put government's penchant for reckless excess in practical terms: "Giving money and power to government is like giving a bottle of whiskey and car keys to teenage boys." P.J. O'ROURKE, PARLIAMENT OF WHORES: A LONE HUMORIST ATTEMPTS TO EXPLAIN THE ENTIRE U.S. GOVERNMENT xviii (1991).

[72]Kennard summed up the approach to standard setting in light of digital television interoperability quite succinctly in a speech to the television industry:

> "My job as Chairman of the FCC is to make sure that consumers benefit from the digital age. But if consumers lose out, and we see gridlock and delay instead of progress, the FCC will have to act. And believe me, you do not want this. You don't want me and an army of FCC lawyers coming in and telling you what to do."

William Kennard, Television in the Digital Age, Remarks before the Variety/Schroeder Media Conference, New York, NY (March. 24, 1999) (text available at <http://www.fcc.gov/Speeches/Kennard/spwek909.html>).

under pressure from Chairman Kennard, cable companies and consumer electronics manufacturers agreed to a standard for linking digital set-top boxes and televisions sets.[73] Acting like a ringmaster in a multi-ringed circus, the Commission also successfully facilitated industry players' efforts to develop standards for V-chip technology. With the dawn of digital television, the Commission stepped into the fray and oversaw extensive tests that culminated in a transmission standard but left all the formats to the marketplace. Unfortunately, the Commission did not impose even this loose standard on the cable and consumer electronics industries, so now players in the digital arena must worry about making their equipment and signals compatible with a multitude of formats.

An ounce of prevention may be worth a pound of cure, but the Commission still struggles with this Axiom. Its efforts to stave off such train wrecks as AM stereo reveal that it is on the right track in adopting Modern Axiom 6: "Failure to Adopt Technical Standards is Tantamount to a Double Standard," and is doing so without embracing Antediluvian Axiom 1.

Warring Axioms No. 7:
Raised Eyebrows vs. Concentrate on Being a Traffic Cop and Get Rid of the Vice and Morals Squad

Economist Milton Friedman once wrote: "Hell hath no fury like a bureaucrat scorned." A seasoned FCC bureaucrat tends to practice an art far more subtle than furious. The name of the bureaucratic game is guilt.[74] By using the "raised eyebrow" approach, the FCC is able to plant, cultivate and harvest guilt, perhaps even fear, in those it regulates. Thus, it is able to control their behavior.

To some extent the lifting of eyebrows is inevitable in situations where the agency retains the power of life and death -- the authority to issue, renew and revoke licenses. And when

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[73]Called IEEE 1394 or "Firewire," this device allows cable television to plug directly into digital televisions and other digital equipment. Cable operators and manufacturers were dragging their feet on developing a standard until Chairman Kennard urged the bickering parties to meet a November 1, 1998 deadline. The first generation of digital television sets were not "cable-ready" in the sense that they did not have a jack available for cable. *Pact on Digital TV Agreed by Set Makers and Cable Companies*, WALL ST. J. Nov. 4, 1998 at B9.

[74]Dan Greenberg, in his classic work, *How to Be a Jewish Mother, A Very Lovely Training Manual*, observed that underlying all techniques of Jewish Motherhood is the ability to plant, cultivate and harvest guilt. "Control guilt," he said, "and you control the child." DAN GREENBERG, HOW TO BE A JEWISH MOTHER, A VERY LOVELY TRAINING MANUAL 13 (1964).

the agency enjoys broad discretion as to how and when to use this power, as does the FCC, this regulatory gambit is even more powerful.[75] But often the real power of the "raised eyebrow" lies not in the threat of being put out of business, but the sub rosa threat of bureaucratic hassling to which the Commission can subject a licensee.[76]

Past examples of eyebrow raising have included FCC chairmen using speeches as a bully pulpit to meddle in areas such as program content where the FCC's statutory authority and the First Amendment limit the Commission's authority to adopt rules. Indeed, one of Chairman Kennard's predecessors once was found to have unlawfully exceeded his authority in using the bully pulpit, but ultimately was exonerated by the Court of Appeals.[77] The trend in the Kennard administration tends to be more akin to the parental "Now don't make me come back there." Using this closely related regulatory gambit, the Commission is able to encourage industry players to work together. Unlike Antediluvian FCC Chairmen who tried to influence by issuing thinly veiled threats, Chairman Kennard does not necessarily raise his eyebrows. His approach is more direct.[78] His insistence on

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[75]Judge David Bazelon described the raised eyebrow effect on broadcasters in the following manner: "Licensee political or artistic expression is particularly vulnerable to the `raised eyebrow' of the FCC; faced with the threat of economic injury, the licensee will choose in many cases to avoid controversial speech in order to forestall that injury." Illinois Citizens Committee for Broadcasting v. FCC, 515 F.2d 397, 407 (D.C. Cir. 1975).

[76]Licensees, like most good Americans, just want to be left alone. As author John Updike so succinctly explained to a Congressional Committee: "I love my government, not least for the extent to which it leaves me alone." JOHN UPDIKE, HUGGING THE SHORE, app. (1983).

[77]In Writers Guild v. FCC, the court held unconstitutional the so-called "family viewing policy" which was adopted by the Television Code of the National Association of Broadcasters ("NAB") when the Chairman of the FCC pressured the NAB into accepting a plan that would banish program material unsuitable for children during family viewing time and be accompanied by warnings. The FCC Chairman's activities were characterized as "backroom bludgeoning." Writers Guild of America, West, Inc. v. FCC 423 F. Supp. 1064, 1142 (C.D. Cal. 1976), vacated and remanded on jurisdictional grounds, sub nom. Writers Guild of America, West v. ABC, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).

[78]Throughout the history of the FCC, the approach to using the Chairman's podium has changed with each administration. The tact has ranged from "fire and brimstone" to total indifference. Newton Minow's characterization of television as a "vast wasteland" electrified, and horrified, a convention of National Association of Broadcasters shortly after he became Chairman and resulted in wide publicity in magazines and newspapers. Years later, Mark Fowler adopted a different approach. In an address to broadcasters, Fowler observed that

pro-competition rules in common carrier and wireless and zero tolerance for consumer abuse, have left no doubt as to what he expects. He has used his position on numerous occasions to highlight important social issues such as equal opportunity and the digital divide.[79]

But one difference in the Kennard FCC that even its critics grudgingly admit is that fairness and an attentive ear are far more common than a raised eyebrow.[80] The

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> "the FCC has no business trying to influence by raised eyebrow or by raised voice for that matter. I confess that there was a romance bordering on chivalry when a Chairman might declare television to be a wasteland. Those kinds of pronouncements, as I see my job, are not mine to make. You are not my flock, and I am not your shepherd."

Mark Fowler, The Public's Interest, an address to the International Radio and Television Society, New York, N.Y., Sept. 23, 1981 [mimeo], p. 9. Chairman Kennard has often used the FCC soapbox to forge relationships and smooth bumps in the road toward competition and deregulation. For example, in the wake of the *Iowa Utilities Board* decision, he told a group of state legislators:

> "But as with any monumental, transforming event, there are differences of opinion about how things should end up and what role each of us should play. In this case, sometimes our differences have mired us in litigation and distracted us from our real job -- serving the American people ... We must not allow this remand -- what I consider a temporary bump in the road -- to slow our progress toward competition."

William Kennard, Moving On, Remarks before the NARUC Winter Meeting, Washington, D.C. (Feb. 23, 1999) (text available at <http://www.fcc.gov/Speeches/Kennard/spwek909.html>).

[79]William Kennard, The Vice and Morals Division of broadcast regulation appears to have been reassigned to the Consumer Protection squad. An arguably good use of raised eyebrows. Molly Ivins has said government is like a hammer: "you can use it to build with or you can use it to destroy with." Ivins, *supra* note 6 at 56. The same can be said of raised eyebrows.

[80]Even the cable industry has commented on the atmosphere of fairness at the Kennard FCC. Doug Halonen, Kennard *Works to Put Stamp on FCC*, ELECTRONIC MEDIA, Nov. 9, 1998 at 1. And that is certainly something worth writing home about considering the industry's suggestions for regulatory relief during the previous administration included shooting the FCC Chairman. David Kline, *Infobahn Warrior*, WIRED, July, 1994 (text available at <http://www.wired.com/wired/archive/2.07/malone_pr.html>).

Chairman never uses his post to whisper suggestions into the ears of industry leaders who crane their necks around, EF Hutton-esque, when he speaks. But this Chairman has rarely, if ever, threatened punishment to those who do not listen, a welcome break from the past.[81]

Modern Axiom 7 called for complete absolution from guilt: "Concentrate on Being a Traffic Cop and Get Rid of the Vice and Morals Squad." This is a lofty goal, especially considering the conventional wisdom that no matter how hard you try to avoid it, you'll probably end up just like your parents. But one might take solace in the belief that each successive generation has it a little better than the one before.

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We had seven axioms to grind with Chairman Kennard. While each axiom shaved closer and closer to the core of his administration, maybe the truest test of all is how he fares with the mother of all FCC oxymorons: FCC regulation. Is there still no such creature? When Kennard penned his oxymoron article, former Chairman Mark Fowler's description of the FCC as "the last of the New Deal dinosaurs" was accepted as accurate.[82] The young Kennard suggested that future FCC Chairmen strive to make the agency as sleek as a jaguar. The record shows that he has tried to morph the Commission into a more agile creature and has made some strides to shed the agency's reputation as a stodgy bureaucracy. He has converted the agency into a consumer advocate with a mission to promote competition, foster innovation, and help bring the benefits of the Twenty-First century to all Americans.[83] Granted, Chairman Kennard stepped into a moving regulatory

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[81]One former FCC Chairman described the 1950s at the Commission as the "Whorehouse Era . . . [w]hen matters were arranged, not adjudicated." WILLIAM BODDY, FIFTIES TELEVISION: THE INDUSTRY AND ITS CRITICS 215 (1993). There were reported cases of television licenses being granted to newspapers that had endorsed Eisenhower for President and denied to those that endorsed Stevenson. Bernard Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655 (1959).

[82]Kennard and his coauthors wrote of Fowler's description: "What he must have visualized is a creature with a head too small for its body, a body too big for its environment, and a tail that just goes on and on." Krasnow, *supra* note 1 at 759.

[83]Richard Folkers, *William Kennard: A Consumer Champion*, U.S. NEWS & WORLD REPORT, Dec. 20, 1998 at 46. Kennard has recognized that

> "[a]s we re-direct the FCC's focus for a competitive age, the FCC itself must change. Already, we have taken some initial steps on the road towards re-engineering the FCC. We are re-focusing and

conveyor belt; he has, after all, been ensconced in this office for scarcely more than a year, a veritable twinkling of the eye for the FCC.[84]

The Chairman favors both free markets and stiletto-type regulation.[85] His record indicates a man who knows how to walk that tight rope. It appears that in this age of convergence, like most oxymorons,[86] regulation and free market are like Ralph and Alice Kramden from TV's "The Honeymooners"; they bicker incessantly but couldn't live without each other. The Chairman has been working closely with regulated industries with the goal of arriving at 'incentive-based solutions involving less regulation by aligning incentives with the pro-competitive outcomes that best serve the public interest."[87] Perhaps it takes a Chairman with some axioms of his own to grind to make FCC and regulation work together.

There is a lesson for all in the article the Chairman wrote in his youth: Watch what you write; it may come back to haunt -- or validate -- you.

> consolidating our enforcement and consumer information functions as well as automating and streamlining our licensing processes across the entire agency. But these steps are only the beginning."

William E. Kennard, *FCC Must Change for the High-Tech 21st Century*, THE HILL, Feb. 3, 1999, at 31.

[84]Nonetheless, it has been a year marked by tough choices and rapidly changing times. As Woody Allen put it, "[m]ore than at any other time in history mankind faces a crossroads. One path leads to despair and utter helplessness; the other to total extinction. Let us pray we have the wisdom to choose correctly." WOODY ALLEN, SIDE EFFECTS 81 (1981).

[85] "Competition does not permit 'total deregulation,' however, even though this is often thought to be a desirable goal. Total deregulation means the abstinence of any rules, which is not a happy condition, as people have experienced recently in places such as Afghanistan, Bosnia, Cambodia, and Somalia."

William E. Kennard, *Recent Development Federal Agency Focus: Federal Communications Commission, Introduction*, 50 ADMIN. L.REV 723, 726 n.2."

[86]An oxymoron is a figure of speech in which two incongruous, contradictory terms are yoked together in a small space. "Appropriately, the word oxymoron is itself oxymoronic because it is formed from two Greek roots of opposite meaning – oxys, 'sharp, keen,' and moros, 'foolish,' the same root that gives us the word moron." Richard Lederer, CRAZY ENGLISH 18 (1989).

[87]*Id.* at 730.