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Our New Community Broadband Awards Program

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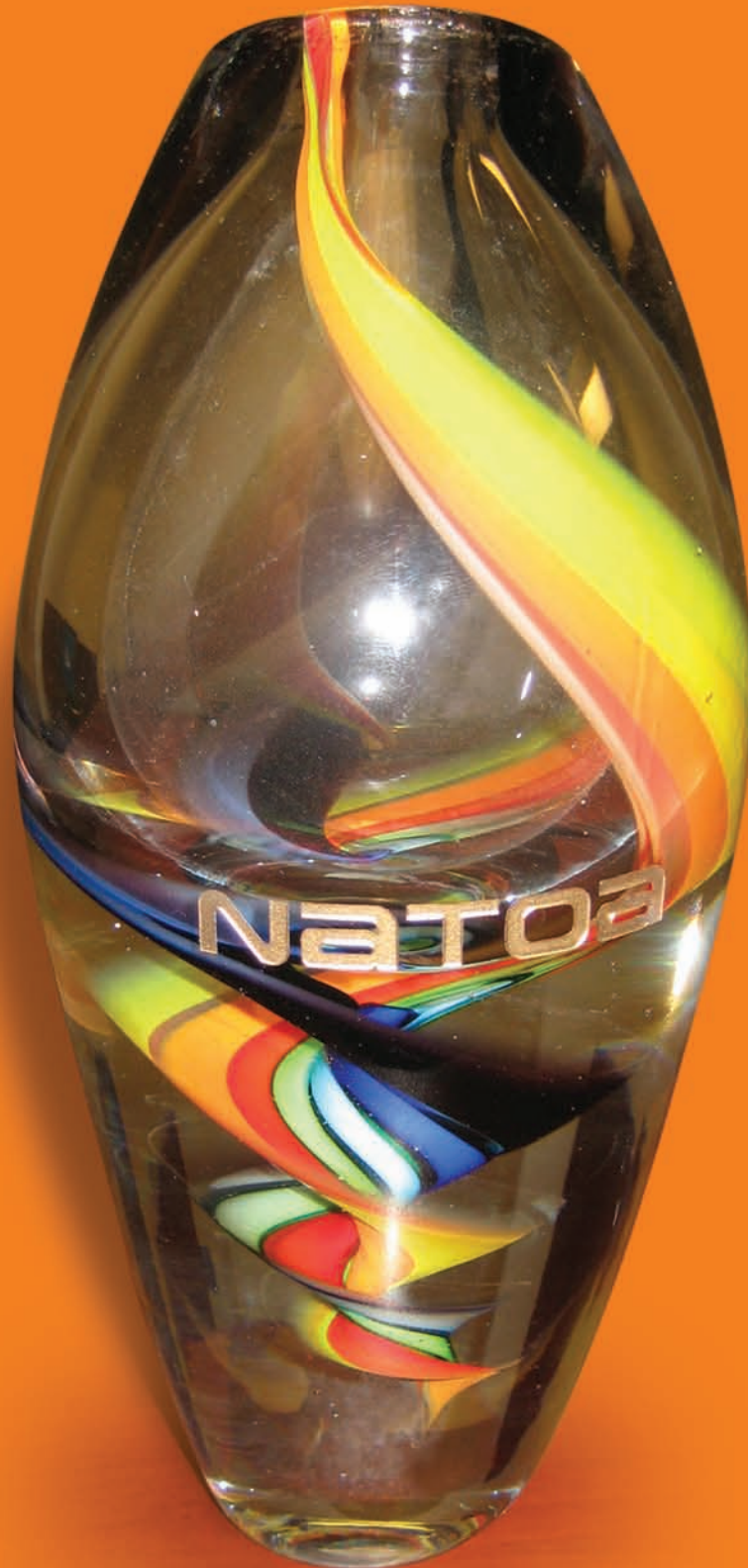
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A Former Insider's View Of The FCC

By Gloria Tristani

Historically, the Federal Communications Commission (FCC) is a government agency that was little known outside Washington, D.C. Incidents like the Janet Jackson Super Bowl exposure helped to change that landscape. For the most part, however, the FCC operates under the radar screen with its workings a mystery.

Congress created the FCC by enacting the Communications Act of 1934 (Act) to “make available ... to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide radio and radio communication service with adequate facilities at reasonable charges...” Services impacted by the FCC include wireline and wireless broadband internet services; digital television; emergency communications; orbital satellite transmissions; low power FM radio broadcasting; and cable services and franchising. And technologies that touch aspects of our daily lives –garage door openers, baby monitors, the EZpass, hearing aids, the latest iPhone – are affected by FCC oversight and rules.

How FCC Commissioners Are Selected

The Act provides that the President appoints with the advice and consent of the Senate the five FCC Commissioners who must be United States citizens, have no financial interest in FCC-regulated entities, and have no other “business, vocation, profession, or employment” while serving. No more than three can be of the same political party. The President also designates the Chairman. Commissioners can be appointed to fill unexpired terms or to five-year staggered terms.

An unwritten qualification of most Commissioners is “being political” whether it’s big “P” or little “p.” Typically, a Commissioner had a

connection to the White House, the Senate, or the House of Representatives. Of the current Commissioners, Chairman Kevin J. Martin was appointed Commissioner and later designated Chairman after working on President George W. Bush's first election campaign. Commissioner Michael J. Copps was appointed with the support of former Senate Commerce Committee Chairman Fritz Hollings, on whose staff Copps served for many years. Commissioner Jonathan S. Adelstein served on Senate Majority Leader Tom Daschle's staff; Commissioner Deborah T. Tate was a former Tennessee regulator, and Commissioner Robert M. McDowell enjoyed the support of then Senate Commerce Committee Chairman Ted Stevens.

Prior Commissions have been no less political. When I was sworn in as Commissioner on November 3, 2007, together with three of my colleagues, we all came in with connections. Chairman Bill Kennard had been the FCC's General Counsel and was supported by outgoing Chairman Reed Hundt who in turn was a high school classmate and close friend of then Vice President Al Gore. Michael J. Powell, a Justice Department attorney and son of General Colin Powell, enjoyed the support of then Senate Commerce Committee Chairman John McCain. Harold Furchtgott-Roth, an economist, had been on the House Energy and Commerce Committee staff. I was a statewide elected regulatory official in New Mexico.

Commissioners can be reappointed unlimited times; former Commissioner Jim Quello served 27 years until he retired in 1997. Moreover, if a Commissioner's term has expired, but no successor has been confirmed, the Commissioner can stay in office until the sitting Congress adjourns. Traditionally, if there is a change in Administration, the Chairman resigns, not only as Chairman but as Commissioner, allowing the President to nominate a

new Commissioner and designate the Chair. Currently, a favorite FCC beltway game is to speculate who will be the next Chairman.

Were a Democratic president to be elected, the conventional wisdom is that either of the two present Democratic Commissioners – Copps or Adelstein – would be contenders, considering their public interest records and Democratic credentials. This scenario could be complicated by the fact that two Democratic presidential frontrunners have former Commissioners involved in their respective campaigns. Former Commissioner Susan Ness is campaigning for Senator Clinton and former Chairs Hundt and Kennard are supporting Senator Obama. These former Commissioners could have a voice in the nomination process. There has not been as much speculation involving the scenario were a Republican president to be elected, understanding that Chairman Martin theoretically could stay under a new Republican administration. Longtime FCC observers note one caveat on predictions – often Commissioner and Chair nominees are unknown inside Washington. I was.

The Chair and Decision Making

While the five FCC commissioners have equal votes on substantive issues, who is the Chair makes a difference. The Chair sets the vision, priorities, and agenda. The Chair decides what issues and proceedings to move forward, presides over all meetings, represents the FCC before Congress, and selects the bureau and office chiefs. The staff is organized by function, and there are seven bureaus: Consumer & Governmental Affairs; Enforcement; International; Media; Wireless; Public Safety and Homeland Security; and Wireline Competition.

While many high profile and key decisions are made by the five Commissioners, the FCC delegates many of its functions and decision making to the different Bureaus. Delegated decisions have the same

force as Commission actions. Typically, the issues that are delegated are routine and settled matters as opposed to new and novel issues of law. Depending on the particular Chair, Bureau Chiefs have greater or lesser leeway in making such decisions.

In addition to the Bureaus, there are ten FCC offices, e.g., Engineering and Technology; General Counsel; and Strategic Planning. The FCC has a staff of 1900 full-time employees and had a FY 2007 budget of \$302,542,000. The bulk of the FCC's budget is offset by the regulatory fees it collects. Of the FCC's \$313,000,000 FY 2008 budget request, \$312,000,000 would be offset by projected regulatory fees. Fines collected by the FCC, like the ones collected for the violations of the indecency broadcast rules, go to the U.S. Treasury.

As an independent regulatory agency, the FCC must follow many of the federal rulemaking laws, including the Administrative Procedure Act, which requires agencies to inform the public about their rules, and provides opportunities for public participation in the rulemaking process. When the FCC issues a Notice of Proposed Rulemaking (NPRM), it provides a certain amount of time for the public to submit comments and reply comments

Generally, the FCC allows for ex parte visits with FCC staff, and individual Commissioners. These ex parte visits are a way for industry, state, or local governmental organizations such as NATOA, and public interest or consumer groups, to press their cases for or against proposed rules. While the ex parte process means to educate the FCC on all sides of the issues, these visits are used overwhelmingly by industry lobbyists and those who have the resources to maintain a large Washington presence and can bring in their top executives and experts at a moment's notice.

In addition, while the ex parte rules require that the parties making

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the visits file written statement disclosing details of the matters discussed (but only if new matters, arguments are presented), many of these statements do not give other stakeholders sufficient information as to what was presented, leaving them in the dark.

Thereafter, the FCC makes a decision on the proposed rules by voting on a draft order. The Commissioners can seek to make changes and seek votes for agreements to those changes. The final vote is either taken on circulation or at one of the monthly public meetings. If the matter gets decided on circulation, all stakeholders can lobby and make ex parte visits until all votes are cast and a decision is announced. When a vote is scheduled for a monthly meeting – and generally this is publicly announced one week before the meeting – ex parte visits are forbidden at that point in time.

Under both scenarios there are longtime concerns that some stakeholders, but not others, are able to get non-public information about scheduled votes and about the actual contents of the draft orders. This September, the Government Accountability Office (GAO) issued a report where it found that many stakeholders knew about scheduled votes on proposed rules well before the FCC notified the public; while other stakeholders were unaware until the FCC released the public meeting agenda, at which time FCC rules prohibited stakeholders from lobbying the FCC.

While FCC processes may sometimes leave the public in the dark, the public can have an impact on FCC decisions. The FCC's beefed up enforcement of its broadcast indecency rules was driven in part by the number of broadcast indecency complaints filed. In 2004, the year of the Jackson

Super Bowl exposure, the FCC received over 1.4 million indecency complaints and proposed a record eight million dollars in fines for indecency violations. The Jackson related fines are still on appeal by CBS.

In 2003, a divided FCC voted to further deregulate its media ownership rules despite receiving over two million emails opposing such changes. While the unprecedented amount of emails did not persuade a majority of Commissioners, the emails were cited by the federal court of appeals in support of its remand to the FCC. The FCC is still in the process of redrafting the remanded ownership rules. Grassroots contacts can make a difference.

As a former Commissioner, I am asked what are the best ways to lobby a Commissioner. If you have the opportunity to visit the FCC offices, remember that a Commissioner is often pulled in many directions and that your number one issue may not even be on the radar screen. With that proviso, here are my suggestions:

- Choose one to three top issues and focus your presentation on the same;
- Make the legal arguments that bolster your position, but more importantly, outline the policy and public interest rationales;
- Back up and illustrate your arguments with data and concrete examples, i.e., if you are arguing that a particular proposal will have an adverse or positive effect on a local governments' communications networks — give specific examples of existing networks and how they would be affected, and finally;
- Make it real and personal – if there is a story that vividly illustrates how a different policy could have made a difference in an outcome – tell that story.

Over the years, NATOA and its members have done an excellent job in making their case before and working cooperatively with the FCC and the Commissioners. NATOA has worked with the relevant FCC Advisory Committees and it is good news that in October the FCC named the members of the newly rechartered Intergovernmental Advisory Committee (IAG). The IAG members, which come from local, state, and tribal governments, are charged with advising the FCC on a variety of telecommunications issues for which their governments share responsibility with the FCC. This particular IAG is charged with assisting the FCC in the DTV transition consumer education efforts.

While working through the advisory committee process is important and constructive, NATOA and its members need to continue to participate in the relevant FCC proceedings. NATOA and its members need to be on the record on issues to maintain a stake in FCC decisions and any subsequent court review. ■

Gloria Tristani, a former FCC Commissioner (1997-2001), is Of Counsel at Spiegel & McDiarmid LLP. While on the FCC, Tristani worked to accelerate broadband deployment to rural and underserved areas; advocated for the "E-Rate" program, which provides discounted Internet access to schools and libraries; and for public interest obligations. Prior to joining Spiegel, she served as President of the Benton Foundation. In 2002 Tristani was the Democratic candidate for the U.S. Senate in New Mexico. Before serving on the FCC, she was elected to and served on the New Mexico State Corporation Commission.