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Astroturf Campaigns: Transparency in Telecom Merger Review

Victoria Peng

University of Michigan Law School

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ASTROTURF CAMPAIGNS: TRANSPARENCY IN TELECOM MERGER REVIEW

Victoria Peng*

“Where enough money calls the tune, the general public will not be heard . . . [and] a cynical public can lose interest in political participation altogether.”

- *McCutcheon v. FEC* (Breyer, J., dissenting)

Large telecommunications companies looking to merge spend millions of dollars in their lobbying efforts to clear regulatory hurdles and obtain approval for their proposed mergers. Corporations such as AT&T, Comcast, and Time Warner use public participation processes as vehicles to influence regulatory decision-making. In the Federal Communications Commission (FCC) merger review context, the notice-and-comment process and public hearings have become fertile breeding grounds for hidden corporate influence. Corporations spend millions on corporate social responsibility programs and call upon nonprofit organizations that receive their largesse to represent their corporate interests as grassroots interests when the FCC seeks public comment. This “astroturfing” undermines what Congress intended to be a “well-reasoned agency deliberation process” and makes the FCC’s notice-and-comment process less democratically legitimate. This Note argues that the FCC should adopt a financial conflicts of interest disclosure rule for all comments it receives, not just comments that include scientific or technological data. Administrative agencies’ anxiety about ensuring the integrity of science-based preferences also applies to values-based preferences because the FCC considers the effects on the public interest in making policy decisions.

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INTRODUCTION

The proliferation of administrative agencies under the New Deal may not have destroyed the constitutional balance of state and federal power, but it has no doubt placed a thumb on the federal side of the scale.¹ Given this dramatic enlargement of federal power, Congress placed procedural checks on agencies to promote transparency, keep the public informed so that those to be affected by administrative regulations can express their views before the regulations take effect, and hold government officials accountable.² The Administrative Procedure Act of 1946 (APA) requires agencies to give public notice of an impending action related to their organization, procedures and rules,³ and then provide a time period for interested persons of the public to weigh in “through submission of written data, views, or arguments” in rulemaking proceedings.⁴ This process is called “notice and comment rulemaking.”

1. See generally Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 Yale L.J. 1920 (2014).

2. See BUREAU OF NAT’L AFFAIRS, I ADMINISTRATIVE PROCEDURE ACT: SUMMARY AND ANALYSIS 1, 1, 3–4 (1946).

3. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT § I-A (1947), <http://archive.law.fsu.edu/library/admin/1947cover.html>.

4. 5 U.S.C. § 553(c) (2012).

Given an increasingly autonomous and decreasingly transparent administrative state, those involved in administrative law and procedure continue to grapple with how agencies should handle the massive volume of comments they receive in the technological era. Current scholarly discussion focuses on whether agencies making policy decisions should pay equal attention to comments expressing unsophisticated value-laden preferences (e.g. this is good, or this is bad) as they do to comments based on specialized knowledge.⁵ At the forefront of research in this area, Professor Cynthia Farina and her colleagues at the Cornell eRulemaking Initiative slotted citizens' preferences about public policy outcomes into four categories: spontaneous, group-framed, informed, and adaptive.⁶ Yet, another type of comment these categories do not capture has become increasingly prevalent in the past decade: corporate-funded preferences. Individuals or entities (i.e. not-for-profit groups or other public interest groups) that have either no preference or different true preferences on an issue yield to the preferences of a corporation because of an existing or expected (oftentimes financial) benefit. These preferences mislead agencies reviewing public comments, as agency officials might have difficulty distinguishing between true individual preferences and corporate-funded preferences. This Note argues that agencies, in particular the Federal Communications Commission (FCC), that receive mass comments should flag and filter out corporate-funded comments to carefully curate and consider comments in a useful, representative, and informative way, and to avoid being misled. There is scant discussion on the need for a financial conflicts of interest disclosure rule in the agency rulemaking context, and what exists focuses on comments presenting scientific analysis.⁷

Although it does not fully adopt notice-and-comment rulemaking procedures in reviewing mergers, the FCC discretionarily gives notice of large merger proposals it receives and takes public comment when those transactions may generate significant public reaction. Recently, large telecommunications companies have grown adept at mobilizing members of the public to submit comments advocating the corporation's position. These efforts have

5. Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343 (2011) (arguing that agencies should pay attention to value-laden comments). Cf. Cynthia R. Farina, Mary Newhart & Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 123 (2012) (explaining that agencies and academics typically regard mass comments—consisting largely of value-laden preferences—as “worse than useless”).

6. Farina, *supra* note 5, at 132–34.

7. See *infra* note 173.

supplemented corporations' robust lobbying to gain regulatory approval of proposed mergers. There are feasible measures that the FCC should implement to enhance the quality of the comments it considers in a mass commenting society. Part I of this Note provides an overview of the FCC's authority to review telecommunications mergers, its mandate to consider the public interest, and its process of taking comments on major transactions that might elicit significant public discussion. Part II examines how financial ties between corporations and nonprofit organizations can affect agency decision-making. Part III proposes a financial conflicts of interest disclosure rule to make public comment filings less misleading and more useful to the FCC. This proposed rule is consistent with the Obama Administration's strong stance in favor of transparency, open government, and public engagement.

I. FCC REVIEW OF TELECOMMUNICATIONS MERGERS

A. *The FCC's Statutory Authority for Merger Review*

Telecommunications companies looking to merge are subject to dual review by the Department of Justice (DOJ) and the FCC. Section 7 of the Clayton Act authorizes the DOJ to block any acquisition that may "substantially . . . lessen competition, or . . . tend to create a monopoly."⁸ Sections 7 and 11 of the Act authorize the FCC to review mergers of "common carriers engaged in wire or radio communication" under a standard that is identical to that of the DOJ.⁹ But the FCC instead chooses to review mergers exclusively under the Communications Act of 1934, broadening the inquiry beyond that which the Clayton Act prescribes.¹⁰

The FCC also has more discretionary review authority under the Communications Act than the DOJ does under Section 7 of the Clayton Act.¹¹ The Communications Act requires the FCC to approve any acquisition or construction of any new communications line by a common carrier or *any transfer of licenses* to transmit signals over the air.¹² The FCC's power under these licensing provisions is

8. See 15 U.S.C. § 18 (2000).

9. See 15 U.S.C. §§ 18, 21(a) (2012).

10. See 47 U.S.C. §§ 214, 310 (2012); see also William J. Rinner, Comment, *Optimizing Dual Agency Review of Telecommunications Mergers*, 118 YALE L.J. 1571, 1574 n.17 (2009); Donald J. Russell & Sherri Lynn Wolson, *Dual Antitrust Review of Telecommunications Mergers by the Department of Justice and the Federal Communications Commission*, 11 GEO. MASON L. REV. 143, 144-45 & n.6 (2002).

11. See generally Russell & Wolson, *supra* note 10.

12. 47 U.S.C. §§ 214(a), 310(d) (2012).

extensive because practically every major telecommunications merger requires the transfer of licenses.¹³ Although both the FCC and the DOJ review the competitive effects of a merger, only the FCC considers on a case-by-case basis whether the transaction as a whole would serve the public interest.¹⁴ Thus, the FCC exercises an important policymaking function that the DOJ does not.

B. The Public Interest Mandate

The Communications Act mandates the FCC to affirmatively determine whether a merger promotes “the public interest, convenience and necessity.”¹⁵ Congress gave the FCC this task because it requires expert judgment and considerable knowledge¹⁶ of a technical, complex, and dynamic industry.¹⁷ This makes the FCC’s merger review more flexible and forward-looking than is the DOJ’s review based solely upon antitrust considerations. The public interest evaluation of a merger appears to require a narrower focus than does analyzing its industry-wide effects, but in practice, the standard “tends to be more amorphous and wide-ranging than Section 7 [of the Clayton Act].”¹⁸

The public interest standard is nebulous in practice because the FCC has been inconsistent in its interpretation of this mandate. The FCC “inquires into whether the proposed [merger] might violate any provisions of the Communications Act or ‘promise[s] to yield *affirmative* public benefits.’”¹⁹ But the agency on occasion has gone beyond considering whether a merger is “in” or “consistent with” the public interest standard and has required mergers to “enhance competition.”²⁰ What is settled is that consumer welfare is an

13. Russell & Wolson, *supra* note 10, at 148.

14. 47 U.S.C. § 310(d) (2012); *see also* Issues Memorandum for March 1, 2000 Transactions Team Public Forum on Streamlining FCC Review of Applications Relating to Mergers, Fed. Commuc’ns Comm’n (2000), <http://transition.fcc.gov/transaction/issuesmemo.html>.

15. 47 U.S.C. § 310(d) (2012).

16. McLean Trucking Co. v. United States, 321 U.S. 67, 87 (1944).

17. Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1002–03 (2005).

18. Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 201 n.142.

19. Rinner, *supra* note 10, at 1574 (quoting Ameritech Corp., 14 FCC Rcd. 14712, 14737–38 (1999) (emphasis added)).

20. *See* NYNEX Corp., 12 FCC Rcd. 19985, 19987 (1997) [hereinafter *NYNEX/Bell Atlantic*] (stating that “[i]n order to find that a merger is in the public interest, we must, for example, be convinced that it will enhance competition”).

important consideration. The FCC might approve a merger because its efficiency savings would lower rates for customers,²¹ thereby enhancing consumer welfare. But the FCC cannot deny a merger simply because it would allow one firm to take advantage of efficiencies that its rivals cannot also exploit.²² The objective of blocking the latter merger is to protect existing competition for less competitive rival firms, not to promote competitive entry for consumers. The public interest standard is concerned with consumer welfare, not *competitor* welfare. Denying that merger in an already concentrated market arguably harms consumer welfare.²³ Thus, the D.C. Circuit Court has held that the FCC is not authorized to “equaliz[e] competition among competitors,” but does have the authority to conduct economic analysis and consider competitive effects of a merger as part of the public interest analysis, so long as its primary objective is to analyze the benefit to the public.²⁴

Courts have provided important insights on the limitations of the FCC’s authority in this area—namely that the focus of the standard is upon the interests of the *public* rather than the interest of *competitors* who may seek to use the merger process to drive a competitor out of the market.²⁵ This still leaves the FCC with nebulous, wide-ranging review authority. The FCC’s public interest considerations include “the effects of the proposed transaction on universal service, national security, spectrum efficiency, technological innovation, and the diversity of views and content.”²⁶ It does not consider politically charged topics like employee job concerns²⁷ because the public interest analysis “is not a broad license to promote the general public welfare.”²⁸ Thus, the FCC’s public interest standard allows the Commission to regulate at least some broader issues

21. *Id.* at 20003 n.67.

22. See Thomas M. Koutsky & Lawrence J. Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the “Public Interest” Standard*, 18 *COMMLAW CONCEPTUS* 329, 343 n.74 (2010) (citing Joseph Farrell, *Creating Local Competition*, 49 *FED. COMM. L.J.* 201, 212 (1996)).

23. See *id.*

24. *SBC Commc’ns Inc. v. FCC*, 56 F.3d 1484, 1490 (D.C. Cir. 1995) (quoting *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974)).

25. Koutsky & Spiwak, *supra* note 22, at 342.

26. See James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department Over Telecommunications Transactions*, 6 *COMMLAW CONCEPTUS* 195, 198 (1998); see also *NYNEX/Bell Atlantic*, *supra* note 20.

27. Koutsky & Spiwak, *supra* note 22, at 338 n.45.

28. See *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 669–70 (1976) (noting that the scope of “public interest” inquiry to ensure “just and reasonable rates” does not reach employee job concerns).

than would otherwise be available under the standard DOJ antitrust analysis.²⁹

C. The FCC Procedures for Merger Review

Parties to a proposed merger initiate FCC review by formally filing an application with the Commission and providing supporting materials.³⁰ The FCC then issues a Public Notice that it has received an application for consent to transfer licenses—to in other words, merge³¹—and makes the entire application record available to the public.³² The FCC provides a schedule for public comment on major transactions that present “novel or complex issues of law or policy” or “propose[] a combination of companies that is likely to have a significant impact on the public or involves [other public interest] issues that are likely to elicit significant public comment.”³³ Any person may file a comment, which becomes part of the public record.³⁴ Since the Commission is approving a transaction rather than promulgating a rule, it is exempt from the notice-and-comment procedures of the APA for rulemaking.³⁵ This means that the APA does not require the FCC to consider all substantial written comments for merger approval, as it would for a rulemaking.³⁶ But the need to differentiate synthetic grassroots comments (“astroturf”) from actual grassroots comments is just as relevant in the FCC’s merger review process as it is in its rulemaking process.

29. STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 683 (3d ed. 2012).

30. ABA SECTION OF ANTITRUST LAW, *in* TELECOM ANTITRUST HANDBOOK 89–90 (2nd ed. 2013) [hereinafter TELECOM ANTITRUST HANDBOOK].

31. *Overview of the FCC’s Review of Significant Transactions*, FED. COMMUC’NS COMM’N (Aug. 15, 2014), <http://www.fcc.gov/guides/review-of-significant-transactions>.

32. Russell & Wolson, *supra* note 10, at 148–49.

33. *FCC’s Review of Significant Transactions*, *supra* note 31.

34. *See id.*; *see also* *Frequently Asked Questions About Transactions*, FED. COMMUC’NS COMM’N (Aug. 15, 2014), <https://www.fcc.gov/guides/mergers-frequently-asked-questions>.

35. BUREAU OF NAT’L AFFAIRS, *supra* note 2, at 6. (“‘Rule’ means the whole or any part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency . . . ‘Order’ means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. ‘Adjudication’ means agency process for the formulation of an order.”).

36. 5 U.S.C. § 553(c) (2012); *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1520 (D.C. Cir. 1988) (articulating the concept of § 553 of the APA as imposing a procedural dialogue between administrative agencies and the public in which an interested party must clearly state its position and the agency must *respond* to significant comments received) (emphasis added).

If the FCC commissioners choose to provide notice and take comment, as they do for major transactions, then they should still want to collect a public record of comments that conveys the public's actual views and that does not contain misleading statements or information.

The applicants bear the burden of proving on the public record that their proposed merger is in the public interest or that the benefits more than offset any likely anticompetitive effect.³⁷ This fundamentally departs from the DOJ merger review process; when the DOJ seeks to block a transaction it must prove by a preponderance of the evidence that the proposed merger has anticompetitive effects.³⁸ The applicants carry a higher burden of proof in seeking FCC approval than in obtaining DOJ approval because of the Commission's public interest mandate.³⁹ The Commission reviews the public record, which includes the parties' documentation and public comments, and determines whether the merger would be in the public interest.⁴⁰ The FCC "may base its decision on evidence that would not be admissible in court and can reject a transaction if the merging parties fail to prove that their deal serves the public interest."⁴¹

The FCC has no statutory deadline for completing its review, but is subject to a 180-day self-imposed deadline.⁴² The Commission, however, rarely adheres to this deadline; telecommunications mergers take between nine and twelve months to conclude, whereas the average merger takes only two to four months.⁴³ The FCC's lengthy

37. See Jon Sallet, *FCC Transaction Review: Competition and the Public Interest*, OFFICIAL FCC BLOG (Aug. 13, 2014, 6:49 PM), <http://www.fcc.gov/blog/fcc-transaction-review-competition-and-public-interest#fn4>; see also Christopher J. Wright, General Counsel, Fed. Commuc'n's Comm'n, Comments Introducing the Transactions Team Presentation on Timely Consideration of Applications Accompanying Mergers (Mar. 1, 2000), <https://transition.fcc.gov/Speeches/misc/statements/wright030100.html>.

38. See, e.g., XM Satellite Radio Holdings Inc., 23 FCC Rcd. 12348, 12365-66 (2008), <http://www.siriusxm.com/wo/i/entity/Merger%20Order%208-5-08.pdf>.

39. The applicant must show that "the transfer is likely to provide affirmative public benefits. That inquiry is plainly required under the statute, since the applicable statutory provisions direct the Commission to determine whether a transfer would serve the public interest." Wright, *supra* note 37.

40. The Commission's "public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits." *XM Satellite Radio*, 23 FCC Rcd. at 12366.

41. Weiss & Stern, *supra* note 26, at 197.

42. See TELECOM ANTITRUST HANDBOOK, *supra* note 30, at 89; see also FED. COMMUC'NS COMM'N, INFORMAL TIMELINE FOR CONSIDERATION OF APPLICATIONS FOR TRANSFERS OR ASSIGNMENTS OF LICENSES OR AUTHORIZATIONS RELATING TO COMPLEX MERGERS, <http://www.fcc.gov/transaction/timeline.html> (last visited Nov. 5, 2015).

43. Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 31-32 (2000).

review of large telecommunications mergers could undermine the public interest merits of the transaction, as Professor Susan Crawford describes:

It's a game: the companies that plan to merge know that if they can get the regulators to spend enough time considering the deal, it will probably go through. There may be a brief struggle with underfunded public-interest groups, but if no other large companies oppose the deal, the feds' investment of time in working with the merging parties, coupled with their interest in moving on to other items on their agenda, generally overcomes any private concerns about consolidation of market power.⁴⁴

The general purpose of public comments has been to inform agencies of constituents' views⁴⁵ and to ensure that proposals are based on "sound factual and legal premises. . . ."⁴⁶ The public comment process has also evolved into a form of democratic policymaking.⁴⁷ When Congress delegated significant portions of its lawmaking responsibilities to federal administrative agencies, it reformed administrative procedure to require agencies to make public "an increased measure of information concerning their organization, functions, and procedures," and afford an opportunity for public participation in the rulemaking process.⁴⁸ Congress was responding to President Roosevelt's remarks that administrative agencies "who perform administrative work in addition to judicial work, threaten[] to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution."⁴⁹ By requiring agencies to give notice and take public comments on each proposed rule, Congress meant to "force unelected bureaucrats to consider the public interest in the formulation of federal regulations."⁵⁰ That mandate also increased agency accountability and

44. SUSAN CRAWFORD, *CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE* 208 (2013).

45. See William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness In Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 *PUB. ADMIN. REV.* 66, 66 (2004) (finding that public comments can serve as fire alarms that help politicians ensure that bureaucracy is responsive to their constituents).

46. See *id.* at 68.

47. See *id.* at 66, 68.

48. BUREAU OF NAT'L AFFAIRS, *supra* note 2, at 3 (quoting Attorney General Tom C. Clark's statement to the Senate Judiciary Committee regarding reforms in administrative law and procedure).

49. *Id.* at 1.

50. Marissa M. Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 *J. PUB. ADMIN. RES. & THEORY* 245, 246 (Apr. 2008).

democratic legitimacy,⁵¹ at least compared to Congress's own legislative drafting processes. Given this legally mandated avenue for public participation, public interest groups could be highly influential when a company seeks regulatory action. In practice, however, the regulated entities themselves are the greatest and most influential participants in the process.⁵²

D. Recent Trends in Public Comment Submissions to the FCC

In the FCC merger review context, both the notice-and-comment process and public hearings have become fertile breeding grounds for direct corporate participation as well as hidden corporate influence. As telecommunications mergers have become more common, a smattering of writings has chronicled corporate use of these public participation processes as vehicles to influence regulatory decision-making.⁵³ In 2007, the year Steve Jobs announced the first iPhone, some Americans were still resentful about telecommunications companies' mid-1990's deals with state utility commissions "to deploy new technologies in exchange for 'incentives,' which were new charges and new ways of charging customers," but ultimately failed to provide enhanced service to customers.⁵⁴ The companies took large tax write-offs after claiming they would replace aging copper wires that ran through homes, schools and offices for phone service with fiber optic cables in the future. But around 1998, the companies started to roll out a type of digital subscriber line (DSL) technology, inferior to fiber optic cables, over the copper wires.⁵⁵ As a result, major telephone companies profited hugely from 1994 to 2004, while American consumers received

51. Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 100 (2011).

52. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1336–37 (2010) (stating that stakeholders with relatively greater resources, such as regulated entities, often dominate the outcomes of regulation through financial inducements or their capacity to digest technical and complicated information); see generally Susan W. Yackee, *Reconsidering Agency Capture During Regulatory Policymaking*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 292 (Daniel Carpenter et al. eds., 2013) (concluding that regulated entities, or business interests, have greater rates of participation and hold more influence, but not consistently across rules or agencies).

53. See *infra* notes 76, 112–13, 186. In recent years, Cecilia Kang at the *Washington Post*, Eliza Krigman and Tony Romm at *Politico*, and Eric Lipton at the *New York Times* have followed and reported on this topic.

54. Robert X. Cringely, *The \$200 Billion Rip-Off: Our Broadband Future Was Stolen*, PBS: I, CRINGELY (Aug. 10, 2007), http://www.pbs.org/cringely/pulpit/2007/pulpit_20070810_002683.html. See generally Bruce A. Kushnick, *The Book of Broken Promises: \$400 Billion Broadband Scandal and Free the Net* (2015).

55. *Id.*

inferior service from U.S. broadband Internet Service Providers (ISPs)⁵⁶ at higher prices⁵⁷ as compared to citizens in other developed countries. This “rent-seeking”⁵⁸ is socially wasteful;⁵⁹ yet, Congress and the FCC have not sought to police the issue, resulting in a less transparent rulemaking process.

Academics cite transparency in agency decision-making as a critical factor to build legitimacy, enhance quality, and increase accountability.⁶⁰ In January 2009, President Obama signed the Memorandum on Transparency and Government, which declared that government should be transparent, participatory, and collaborative.⁶¹ Specifically, President Obama asked the heads of executive departments and agencies to work together to “ensure the public

56. *Id.*

57. An October 2014 report by the New America Foundation’s Open Technology Institute comparing broadband offerings in twenty-four countries across the world showed that consumers in Europe and Asia pay as little as around \$30 a month for a 1000 Mbps Internet download speed. By contrast, Verizon’s top tier is a 500 Mbps connection that is available to some residents of New York City, Washington D.C., and Los Angeles for about \$300 a month. Danielle Kehl et al., *THE COST OF CONNECTIVITY 2014*, OPEN TECH. INST. 11–12 (2014), https://static.newamerica.org/attachments/229-the-cost-of-connectivity-2014/OTI_The_Cost_of_Connectivity_2014.pdf. The OECD’s latest available data on broadband speed and price in thirty-four member countries places the U.S. in the middle towards the bottom of the pack. *See id.* at 2–3.

58. The term “rent seeking” describes an attempt to secure via government regulation economic “rents” not otherwise available from the market. In a typical example, a business solicits regulatory barriers on market entry, such as a licensing requirement, and if successful, obtains the benefits of higher price levels resulting from reduced competition. In the telecom context, a corporation seeks rent when it attempts to increase its market share by spending money on lobbying to impose regulations on competitors. *See generally* Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974) (coining the phrase “rent seeking”); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies and Theft*, 5 W. ECON. J. 3, 228 (1967) (explaining socially wasteful effects of rent seeking).

59. *See generally* Tullock, *supra* note 58.

60. *See, e.g.*, Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 925 (2009) (summarizing results of discussions from a nonpartisan Task Force on Transparency and Public Participation); Farina, *supra* note 5, at 135 (“[D]ecades of judicial elaboration have constructed rulemaking as a process in which outcome legitimacy turns on a formally transparent process of reasoned deliberation.”); Michael Halpern, Comments on *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 44 ENVTL. L. REP. 10681, 10682 (2014) (“The need to foster legitimacy cannot be understated: an opaque process fosters a lack of faith in government, which undermines a rule’s effectiveness.”); Mendelson, *supra* note 5, at 1379 (arguing that disclosure and transparency are the best incentives for agencies to be democratically responsive to executive supervision and public comment). *See generally* IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 71–73 (1992).

61. Exec. Office of the President, Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009). The memorandum was released on January 21, 2009 [hereinafter Memo for Heads of Executive Dep’ts].

trust and establish a system of transparency, public participation, and collaboration.”⁶²

Yet in 2014, the year the iPhone 6 was released, Americans still complained that the FCC’s decision-making lacked transparency in process and legitimacy in outcome. And today, many commenters will not receive agency responses to their comments in a mass commenting society. These people will not know whether the FCC has considered their comments, and as a result, may have less confidence in the Commission’s ultimate policy outcome.

These consumer sentiments have reemerged in the wake of the FCC’s net neutrality rulemaking. At the core of the net neutrality debate was the issue of whether ISPs, which are gatekeepers to the Internet, equipped with the power to slow down some content or speed up others and potentially charge for prioritization, should be able to control access to the Internet in this way.⁶³ In one striking moment, weekly satirical news show host John Oliver delivered a thirteen-minute rant lambasting the FCC’s approach to net neutrality in June 2014.⁶⁴ Oliver’s call for viewers to comment on the FCC’s site may have crashed the agency’s servers.⁶⁵

The FCC received approximately 3.7 million comments on net neutrality.⁶⁶ The Commission explained that technological and human resources would summarize and condense the comments it received.⁶⁷ When asked at the time whether he thought the net neutrality comments would matter to the FCC, George Washington University Law School professor Richard Pierce replied, “[t]he vast majority of the comments are utterly worthless.”⁶⁸ He pointed to the fact that rulemaking and policymaking are systematically biased towards deep-pocketed industries whose detail, data, and analysis-

62. *Id.*

63. Statement on Internet Neutrality, 2014 DAILY COMP. PRES. DOC. 841 (Nov. 10, 2014).

64. *Last Week Tonight with John Oliver: Net Neutrality* (HBO television broadcast June 1, 2014), <https://www.youtube.com/watch?v=FPbOEOoRrHyU>; see Doug Aamoth, *John Oliver’s Net Neutrality Rant Crashes FCC Servers*, TIME (June 3, 2014), <http://time.com/2817567/john-oliver-net-neutrality-fcc/>; Soraya Nadia McDonald, *John Oliver’s Net Neutrality Rant May Have Caused FCC Site Crash*, WASH. POST. (June 4, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/06/04/john-olivers-net-neutrality-rant-may-have-caused-fcc-site-crash/>.

65. See *Last Week Tonight with John Oliver*, *supra* note 64.

66. See Protecting and Promoting the Open Internet, 80 Fed. Reg. 19737, 19746 (April 13, 2015), <http://www.gpo.gov/fdsys/pkg/FR-2015-04-13/pdf/2015-07841.pdf>; see also @GigiBSohnFCC, TWITTER (Sept. 16, 2014, 2:24 PM), <https://twitter.com/GigiBSohnFCC/status/511989049725571072> (revealing the number of comments the FCC received as the extended public comment period ended).

67. Elise Hu, *1 Million Net Neutrality Comments Filed, But Will They Matter?* NATIONAL PUBLIC RADIO (July 21, 2014), <http://www.npr.org/sections/alltechconsidered/2014/07/21/332678802/one-million-net-neutrality-comments-filed-but-will-they-matter>.

68. *Id.*

backed comments can change minds.⁶⁹ In the FCC's merger review context, however, the Commission's public interest mandate should bar it from discounting such a large volume of comments for lack of technical savvy.

In another pivotal moment, FCC Commissioner Mignon Clyburn engaged in an ill-fated "Ask Me Anything" (AMA) session on the social news site Reddit in November 2014.⁷⁰ The session brought out public dissatisfaction with the comment process and disappointment with the FCC's regulation of the telecommunications industry, or lack thereof.⁷¹ Whatever intentions the FCC Commissioner had in agreeing to participate in the crowd-sourced interview, it resulted in an online press conference gone wrong.⁷² The session quickly turned into a de facto public comment forum, the theme of which was that the agency and its officials are disconnected from the public. Clyburn spent most of her time parrying the community members' thrusts that their comments were not being read and that their voices, even en masse, were not being heard.⁷³

One might argue that *Last Week Tonight with John Oliver* and Reddit attract certain demographics that may not represent the views of the American public as a whole. It is also possible to contend that both the FCC site crash and the Clyburn AMA were fodder for sensationalism while a high profile, large stakes merger between Comcast and Time Warner Cable were under FCC review. Taken together, however, they signaled to those watching, including the

69. *Id.* (referencing Kimberly D. Krawiec, *Don't 'Screw Joe the Plummer': The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53–103 (2013) (finding that in the comment process for the Volcker rule, proponents of strict regulation of financial institutions dominated numerically, but were still outweighed by technical comments from industry members affected by the regulation in the eyes of agency decision makers)).

70. Mignon Clyburn (MClyburnFCC), *I Am FCC Commissioner Mignon Clyburn. Ask Me Anything!*, REDDIT (Nov. 21, 2014), https://www.reddit.com/r/IAmA/comments/2n0co6/i_am_fcc_commissioner_mignon_clyburn_ask_me/.

71. *Id.*

72. See Kevin Collier, *FCC Commissioner Mignon Clyburn's Reddit AMA Did Not Go Well*, DAILY DOT (Nov. 23, 2014, 3:24 PM), <http://www.dailydot.com/politics/reddit-ama-fcc-mignon-clyburn/>; see also Dana Liebelson, *This FCC Commissioner Did A Reddit Chat. It Did Not Go Well*, HUFFINGTON POST (Nov. 22, 2014, 5:02 PM), http://www.huffingtonpost.com/2014/11/22/mignon-clyburn-reddit-chat_n_6204572.html.

73. Commenters voiced skepticism about the public comment process and whether the FCC listens to the public, to which Clyburn responded, "Public comments absolutely influence the FCC deliberations, including rule makings [sic]." This response was downvoted 121 times by Reddit users. See MClyburnFCC, Comment to Mignon Clyburn, *supra* note 69. At another point in the thread, Clyburn responded, "I disagree completely. Your voices are being heard and your comments are being read," which received 238 downvotes. See *id.*

media, that the FCC's failure to take the public seriously has rendered the Commission's legitimacy fragile—or at least not as robust as the American people would like.

II. CORPORATIONS, INFLUENCE-BUYING, AND RULEMAKING

When a corporation gives money to a politician, this is lobbying, which carries a negative connotation, but when it gives to a nonprofit organization, this is philanthropic corporate social responsibility, which carries a positive connotation. Even though both types of spending are formally distinct, they are not necessarily functionally different. The impulse to curtail money flow from corporations to politicians, particularly those engaged in oversight, stems from the intuition that elected officials might violate their duty to serve their constituents' interests if they stand to benefit financially from shaping laws to benefit the private parties that fund their campaigns. But efforts to curtail lobbying have been largely unsuccessful,⁷⁴ especially after the Supreme Court in *Citizens United v. FEC* interpreted corporate independent expenditures—money not donated directly to campaigns, but spent to persuade the voting public through other means such as advertising—as a form of protected speech under the First Amendment.⁷⁵ Moreover, legislators do not have a comparable impulse to curtail corporate money flow to nonprofit organizations even though they play a significant role in the notice-and-comment process of agency rulemaking. As third parties in the rulemaking process, nonprofits appear independent and objective, yet their potential financial conflicts of interest may cast doubt on this characterization. The notice-and-comment process incentivizes corporations to cultivate relationships with nonprofit groups as a key source of potential support for corporate actions under regulatory review.⁷⁶

Through the practice of “astroturfing,” corporations co-opt certain politicians and nonprofit groups to create the appearance of grassroots support for the corporate position.⁷⁷ In the same way “AstroTurf” first mimicked natural grass on the Houston Astros' baseball field, an “astroturf” campaign creates the impression of a

74. *Money and Politics: Ask What Your Country Can Do for You*, THE ECONOMIST (Oct. 1, 2011), <http://economist.com//>.

75. 558 U.S. 310, 319 (2010) (holding that “[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether”).

76. Eliza Krigman, *AT&T Gave Cash to Merger Backers*, POLITICO (June 10, 2011), <http://politico.com////.html>.

77. Mendelson, *supra* note 5, at 1372.

sincere grassroots movement when it actually advances a corporate interest. An early example of astroturfing involved tobacco giant Philip Morris. Beginning in 1958, the company had given millions each year to the art industry in New York City, and with anti-smoking legislation pending before the New York City Council in 1994, Philip Morris executives telephoned art institutions that received significant donations and asked them to voice support for the company with the City Council.⁷⁸ Those efforts ultimately failed as New York City banned indoor smoking in places like restaurants and bars in 2002 and most outdoor smoking in 2011,⁷⁹ but in the short run Philip Morris influenced agency policymaking regarding the link between smoking and cancer in favor of the tobacco industry.⁸⁰

Similarly, in the late 1990s, administrative agencies recognized that “medical researchers and other scientists [were] increasingly vulnerable to temptation from patent royalties and other sources of remuneration,”⁸¹ prompting a series of reforms including financial conflicts of interest disclosure. There is no reason to think that money would not exert the same pressures on interest groups in the telecom setting as it has in the medical research setting. Astroturfing thus creates a conflict of interest where a nonprofit organization founded to serve a public interest might compromise its mission when it stands to benefit financially from serving the interests of certain private parties.

A. Astroturfing in the FCC Context Unfairly Skews the Landscape of the Public Interest Towards the Industry

Although astroturfing can be misleading for many, if not all, federal agencies that take notice and comment, the FCC is particularly susceptible because its statutory public interest mandate for reviewing mergers implicitly requires the agency to consider public views. Corporate interests amplified through astroturf comments create the appearance of widespread support for a proposed merger as it undergoes FCC scrutiny. These comments most closely relate to those Professor Farina identified as group-framed preferences, which are generated when an interest group shares its position on a

78. Paul Goldberger, *Philip Morris Calls In I.O.U.'s in the Arts*, N.Y. TIMES (Oct. 5, 1994), <http://nytimes.com/...-calls-in-iou-s-in-the-arts.html?pagewanted=All>.

79. Jordana Ossad, *New York City Outdoor Smoking Ban Begins*, CNN (May 24, 2011), <http://www.cnn.com/2011/US/05/23/new.york.smoking.ban/>.

80. See *infra* note 163.

81. William M. Sage, *Regulating Through Information: Disclosure Laws and American Healthcare*, 99 COLUM. L. REV. 1701, 1807–08 n.399 (1999).

specific issue with its members, who then form their preferences on the issue based on the group's position without considering other sources of information.⁸² Unlike group-framed preferences, however, corporate-funded preferences are backed by something more than shared values underlying an individual's affiliation with the group—they are motivated by a financial interest. A corporate-funded preference is created when an individual or entity—usually a nonprofit organization that the corporation helps fund—that is not a party to the merger deliberately aligns its values with the corporation's values on a specific issue. The individual or entity is motivated to do so by a desire for continued corporate sponsorship, not because the individual or entity necessarily shares those values. In the merger context, the corporate-funded preference does not help smoke out the true public interest merits of a merger because the individuals and entities simply amplify the corporation's views on the issue rather than developing and voicing their own independent views.

Mass comments to the FCC in recent telecom mergers have revealed astroturfing from both proponents and opponents of proposed deals. Public interest groups have prompted individuals to file tens of thousands of one-page comments opposing these deals and many of these letters have used language provided by the groups.⁸³ Likewise, large telecommunications companies have encouraged nonprofit organizations benefiting from their largesse to file comments supporting the deal. But, agencies should be more concerned about astroturfing when the actor is a corporation than when it is an interest group. The most obvious difference is that the nonprofit organizations that have been called upon for support benefit financially from the companies they endorse, whereas individual opponents submit comments of their own volition even if interest group nudging was the trigger.

Thus, financial ties between corporations and nonprofits create a troubling conflict of interest that is distinguishable from a harmless conflict of interest that non-financial ties between public interest group and individuals create. Interest group-facilitated comments might also use persuasive techniques to motivate citizens to participate in commenting, such as appeals to emotion, inflammatory language and imagery, and selective use of facts and information.⁸⁴ But these techniques place less pressure on the public to engage

82. Farina, *supra* note 5, at 133.

83. CRAWFORD, *supra* note 44, at 203.

84. Farina, *supra* note 5, at 135, 141–42.

and are less persuasive than money because they are easier to refuse. Furthermore, it is commonplace for individuals, interest groups, and industry groups to use rhetoric to engage the public to file comments.⁸⁵ Interest group-facilitated comments are also more representative of actual public preferences than are corporate-facilitated comments from nonprofit organizations. Individuals adopt the interest group's preference because they voluntarily accept it, not because they have a financial incentive to adopt those views in lieu of their actual preferences or no preference at all. Interest group-facilitated comments also make notice and comment more representative on the whole because there is already a longstanding imbalance in the rulemaking process.⁸⁶ Currently, industry and business groups have greater influence over agencies than public interest groups do because they are better organized and have more financial resources to expend on obtaining technical expertise on the relevant issues.⁸⁷ Thus, telecom astroturfing further skews the rulemaking process in favor of the telecom industry, decreasing the democratic legitimacy of the commenting process.

B. *Telecom Giants Buying Influence of Nonprofit Groups*

Over the past decade, telecommunications corporations looking to merge have employed creative, enormously expensive, and carefully orchestrated astroturf campaigns.⁸⁸ Recent telecom deals facing regulatory scrutiny demonstrate a clear pattern—those companies distribute tens of millions of dollars to support left-wing, diverse nonprofit groups with no obvious interest in these deals. The Comcast-NBCUniversal merger and the attempted AT&T-T-Mobile and Comcast-Time Warner Cable mergers have all involved large influence-buying campaigns.⁸⁹ In each case, nonprofit support was vocal and widespread and a substantial number of nonprofits delivered public endorsements to the FCC. These comments, however, had little to do with the public interest merits of the deal itself.⁹⁰ The FCC, in complying with its statutory public

85. Nina A. Mendelson, *Should Mass Comment Count?*, 2 MICH. J. ENVTL. & ADMIN. L. 173, 178 (2012).

86. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 132 (1998) (noting that a Senate Committee found that “regulated industries spend from ten to one hundred times as much as public interest groups do in rulemaking and adjudication proceedings”).

87. See Wagner et al., *supra* note 51, at 102.

88. CRAWFORD, *supra* note 44, at 204–05.

89. *Id.*

90. *Id.*

interest mandate, should place less weight on astroturf comments relative to genuine grassroots comments. Astroturf comments magnify business interests and could drown out the voices of public interest groups that are oftentimes fewer in number, but express actual views that are useful to the agency.

1. The Comcast-NBCU Merger

Between 2001 and 2010, Comcast paid over \$2.2 billion in charitable contributions,⁹¹ affording itself a creative way to influence lawmakers.⁹² In 2009 alone, the same year it announced its plan to acquire NBCUniversal in a thirty billion dollar deal, Comcast spent more than \$400 million in cash and in-kind contributions (mostly televised public service announcements) to U.S. charities.⁹³ The company encouraged letters to the FCC from more than one thousand nonprofits (in addition to government officials and community activists), including “community centers, rehabilitation centers, civil rights groups, community colleges, sports programs, [and] senior citizen groups.”⁹⁴ It was unclear how this motley crew of nonprofit organizations was connected with the telecom deal beyond their common, major annual funder, Comcast.⁹⁵ Instead, it seems more reasonable to infer that Comcast had paved the way for favorable public statements on its behalf.

The effectiveness of Comcast’s astroturf campaign was evident at the sole FCC-convened field hearing on the merger in Chicago in July 2010. Of the five FCC commissioners, only one, Michael Copps, attended the hearing; then-FCC Chairman Julius Genachowski sent a video statement on the importance of the regulatory-review process.⁹⁶ Observers characterized the hearing as a farce.⁹⁷ A majority of voices present during the two-hour public-

91. COMCAST CORP., 2010 CORPORATE SOCIAL RESPONSIBILITY REPORT 24 (2010), http://files.shareholder.com/downloads/CMCSA/0x0x479342/587c9f26-1f9c-4ced-9514-2c38aaa5939e/FINAL_2010_CRR_6.27.11.pdf.

92. CRAWFORD, *supra* note 44, at 204.

93. *Id.*

94. *Id.* at 203.

95. *Id.* at 203–04 (providing an account of unrelated groups speaking for Comcast, including a diagnostic treatment center, a drug prevention center, a dance program for at-risk youth, and an organization that supports companion animals).

96. CRAWFORD, *supra* note 44, at 203; Margaret Smith, *At Public Hearing, Citizens Speak Out Against—and For—Comcast/NBC Merger*, IN THESE TIMES (July 15, 2010), http://inthese-times.com/itdlist/entry/7597/at_public_hearing_citizens_speak_out_againstand_forcomcast_nbc_merger.

97. *See* CRAWFORD, *supra* note 44, at 203–04, 207.

comment period were nonprofit organizations that told the commission how much they had benefited from Comcast's corporate generosity.⁹⁸ The unusual backers of the deal included a Hispanic civil rights group, a dance program for at-risk youth, a drug prevention group,⁹⁹ and an organization supporting "companion animals."¹⁰⁰ An opponent of the deal addressed the elephant in the room—she explained that Comcast's effort as a corporate citizen had nothing to do with the merger because none of those "social service programs" would be jeopardized if the FCC blocked the deal.¹⁰¹

The nonprofit organizations that supported the deal appeared to be grassroots interests, but were actually a band of individuals submitting separate comments that represented a single view Comcast created to further its corporate interest. Taken together, one can infer that Comcast tried to increase its influence with the FCC by amplifying its views through recipients of its largesse. Because nonprofit organizations generally operate to add value to the social group they serve, the FCC would likely find their views on public interest issues to be credible and associate their views with those of other similarly situated members of the greater population. If the FCC created a pie chart of the public preferences it has received through filed public comments, the chart would already be distorted by regulated entities taking a disproportionately large slice simply because they participate more in commenting than public interest groups do.¹⁰² Comcast's astroturfing would cause its preferences to occupy a larger slice of the pie than that to which it should be entitled, thus worsening the preexisting distortion.

2. The AT&T/T-Mobile Merger

Shortly after the FCC approved the Comcast-NBCU deal in 2011, AT&T applied the same influence-buying campaign tactics in its attempted merger with T-Mobile. When the thirty-nine billion dollar AT&T/T-Mobile deal was under FCC review, large nonprofits such as the National Association for the Advancement of Colored People (NAACP), the Gay & Lesbian Alliance Against Defamation

98. See *id.* at 203; see also Smith, *supra* note 96.

99. John Eggerton, *Comcast Gets Better of Early Open Mike*, BROADCASTING & CABLE (July 13, 2010), <http://www.broadcastingcable.com/blog/bc-dc/comcast-gets-better-early-open-mike/68719>.

100. CRAWFORD, *supra* note 44, at 204.

101. See Smith, *supra* note 96.

102. See West, *supra* note 45, at 68.

(GLAAD), and the National Education Association (NEA), the nation's largest teachers union, wrote individually to urge the FCC to approve the deal.¹⁰³ Purely local charities—some so small they had a single staff member—such as a homeless shelter and clinic in Louisiana, a Habitat for Humanity chapter in South Carolina, and an employment agency for special-needs adults in Michigan, also submitted endorsement letters to the FCC.¹⁰⁴ Not included in these letters, however, was that each backer had received money from AT&T, and for some, just five months prior to their time of writing.¹⁰⁵

AT&T denied any quid pro quo arrangement, but its corporate giving arm, the AT&T Foundation, had spent sixty-two million dollars in 2009 in nonprofit contributions,¹⁰⁶ and \$148 million in 2010 through its corporate foundation and employee-giving programs,¹⁰⁷ raising suspicions about whether the company was cashing in on its corporate donor status to advance its corporate interests. The charities publicly stated that the money they received from AT&T did not influence their decision to lobby the FCC,¹⁰⁸ but their behavior indicated otherwise. GLAAD's president and six board members resigned when its merger endorsement made headlines and revealed that the organization had received AT&T funds.¹⁰⁹ The views GLAAD conveyed to the FCC in support of the merger evoked uproar within the LGBT activist world, revealing that GLAAD's comment was misleading because it did not accurately represent the views of its membership but was instead influenced by its corporate backers.¹¹⁰

Through support from left-wing groups—labor unions, minorities, and environmentalists—AT&T increased its political clout by

103. Krigman, *supra* note 76.

104. Jason McLure, *Charities Supporting AT&T's Buyout of T-Mobile have Financial Incentive*, The Center for Public Integrity (May 19, 2014, 12:19 PM), <http://www.publicintegrity.org/2011/10/17/7118/charities-supporting-att-s-buyout-t-mobile-have-financial-incentive>.

105. Krigman, *supra* note 76 (noting that the NAACP, one of the first groups to announce public support of the merger, had received a one million dollar contribution from AT&T in 2009 in addition to six figure funds from the company since 2006; GLAAD received fifty thousand dollars; the NEA received seventy-five thousand dollars; and the Columbia Urban League received twenty-five thousand dollars); McLure, *supra* note 104 (The Shreveport-Bossier Rescue Mission received fifty thousand dollars from AT&T five months before writing to FCC Chairman Julius Genachowski).

106. Krigman, *supra* note 76.

107. McLure, *supra* note 104.

108. *Id.*

109. Matthew Lasar, *Astroturf Hurts: Leadership Resigns After GLAAD supports T-Mobile Sale*, ARS TECHNICA (July 5, 2011), <http://arstechnica.com/tech-policy/2011/07/glaadatt-melt-down-new-rules-for-teclo-backed-non-profits/>.

110. See McLure, *supra* note 104.

pressuring the FCC's Democratic party members who might have otherwise opposed wireless industry consolidation that could leave Americans with fewer provider choices and higher prices for poorer service.¹¹¹

The AT&T Foundation's sophistication in its charitable giving is also a product of the company's organization. AT&T placed its chief lobbyist and senior executive vice president, James Cicconi, in the chairman position of the charitable arm.¹¹² AT&T executives sit on the boards of some of the nonprofits that wrote to the FCC in support of the deal.¹¹³ Thus, a direct chain exists through which AT&T can influence the views or activities of its nonprofits if so desired.

3. The Comcast-Time Warner Cable Merger

In February 2014, Comcast announced a proposed forty-five billion dollar merger with Time Warner Cable.¹¹⁴ Comcast applied the same aggressive lobbying tactics in its recent bid to buy Time Warner Cable as it did before obtaining FCC approval in 2011 to buy NBCUniversal.¹¹⁵ Comcast executives conceded that they had been working to organize a comprehensive push for FCC approval of the deal, but adamantly rejected any suggestion that the company gave money to nonprofit groups and charities (particularly those serving African-Americans, Latinos, and Asians) to buy off support for their merger deals, saying it was "offensive to the organizations [they] support"¹¹⁶ and "[w]e have never provided financial support to an organization in exchange for support in a transaction."¹¹⁷ The behavior of nonprofit groups suggests otherwise. The corporate-sponsored comments that the FCC received

111. Brooks Boliek & Mike Zapler, *AT&T Deal Offers Risk, Reward*, POLITICO (Apr. 22, 2011), <http://www.politico.com/news/stories/0411/53580.html>; Krigman, *supra* note 76.

112. McLure, *supra* note 104.

113. *Id.*

114. Comcast ultimately aborted its plan to acquire Time Warner Cable in April 2015. See Shalini Ramachandran, *Comcast Kills Time Warner Cable Deal*, WALL ST. J. (Apr. 24, 2015), <http://www.wsj.com/articles/comcast-kills-time-warner-cable-deal-1429878881>.

115. See Tony Romm, *Comcast Spreads Cash Wide on Capitol Hill*, POLITICO (Mar. 9, 2014), <http://www.politico.com/story/2014/03/comcast-cash-spread-wide-on-capitol-hill-104469.html>; see also Eric Lipton, *Comcast Recruits Its Beneficiaries to Lobby for Time Warner Deal*, N.Y. TIMES (Apr. 5, 2015), <http://www.nytimes.com/2015/04/06/business/media/comcast-recruits-its-beneficiaries-to-lobby-for-time-warner-deal.html>.

116. Eric Lipton, *Comcast's Web of Lobbying and Philanthropy*, N.Y. TIMES (Feb. 20, 2014), <http://www.nytimes.com/2014/02/21/business/media/comcasts-web-of-lobbying-and-philanthropy.html>.

117. Lipton, *supra* note 115.

echoed Comcast and Time Warner Cable's defense of the merger before the Senate Judiciary Committee in April 2014, when Committee members expressed concern that the merger would raise cable television and high-speed Internet prices for consumers: Comcast and Time Warner do not compete anywhere, so merging would not affect competition.¹¹⁸ This comment was repeatedly submitted to the FCC over the course of the Commission's merger review period, and it has also appeared in different media spaces. The agency should be concerned about a possible conflict of interest because the outspoken nonprofit organizations have, at best, a tenuous connection to the telecom deal.

Within a few hours of Comcast's merger announcement, the U.S. Hispanic Chamber of Commerce publicly endorsed the deal, calling it a "win-win situation for American businesses."¹¹⁹ Notably, the Hispanic Chamber of Commerce collected at least \$320,000 from Comcast from 2004 to 2012, and did not mention that funding in its public endorsement¹²⁰ or its comment to the FCC.¹²¹ In August 2014, Varsovia Fernandez, the president and chief executive of the Greater Philadelphia Hispanic Chamber of Commerce, which has received \$95,000 from Comcast over the last three years, filed a comment with the FCC¹²² that parroted Comcast's and Time Warner Cable's statements to the aforementioned Senate Judiciary Committee in April 2014.¹²³ In December 2014, Fernandez wrote an op-ed in *The Philadelphia Daily News* arguing that the widespread public criticism of the merger was neither balanced nor fact-based and "cheapens what should be an important debate and puts [this country's] long-term economic health at risk."¹²⁴ Nowhere in the piece did she mention that Comcast funded her organization. Readers may well have given Fernandez's opinion piece greater

118. Edward Wyatt, *Senate Panel Expresses Caution on Merger of Cable Giants*, N.Y. TIMES (Apr. 9, 2014), <http://www.nytimes.com/2014/04/10/business/media/senate-committee-begins-its-review-of-comcast-deal.html>.

119. U.S. Hispanic Chamber of Com., *USHCC Congratulates Comcast on Planned Merger with Time Warner Cable* (Feb. 13, 2014), <http://ushcc.com/wp-content/uploads/2014/02/Feb-13-2014-USHCC-Congratulates-Comcast-on-Planned-Merger-with-Time-Warner-Cable.pdf>.

120. Lipton, *supra* note 116.

121. Letter from Marc Rodriguez, Chairman of the Board, and Javier Palomarez, President & CEO, U.S. Hispanic Chamber of Com., to Fed. Commc'ns Comm'n (Aug. 25, 2014), <http://apps.fcc.gov/ecfs/comment/view?id=6018319455>.

122. Letter from Varsovia Fernandez, President & CEO, Greater Philadelphia Hispanic Chamber of Com., to Fed. Commc'ns Comm'n (Aug. 23, 2014), <http://apps.fcc.gov/ecfs/comment/view?id=6018311866>; Lipton, *supra* note 116.

123. Wyatt, *supra* note 118.

124. Varsovia Fernandez, *Comcast Deserves a Fair Shake*, PHILA. DAILY NEWS (Dec. 16, 2014), http://www.philly.com/philly/opinion/20141217_Comcast_deserves_a_fair_shake.html (last accessed Apr. 11, 2015).

credit than they would have with knowledge of the financial relationship.

One might suggest that Fernandez's op-ed expressed her own views, independent from the Hispanic Chamber of Commerce in the article. Even if the Hispanic Chamber of Commerce would have taken the same position absent the financial contribution from Comcast, it would still have been helpful to the FCC to know that the organization received corporate funds in determining whether to discount the comment she filed and the opinion piece, if the FCC decided to take notice of it. Without this information, the FCC may have assumed that the organization was a disinterested party when it was not. At the very least, disclosure would avoid the appearance of impropriety for nonprofit groups submitting comments to the agency if a financial conflict of interest is later revealed. Moreover, disclosure may avoid the public's loss of confidence in the commenting process.

A nonprofit comment that is supported by data and expertise might appear even more credible and valuable to the FCC. In April 2015, the *New York Times* shined the public spotlight on Geoffrey A. Manne, executive director of the International Center of Law and Economics, a nonprofit, nonpartisan research center.¹²⁵ Manne also helps run an advocacy group called TechFreedom, which a small group of donors, including Comcast, fund.¹²⁶ In the year before it announced the proposed merger, Comcast—through its trade association the National Cable & Telecommunications Association—distributed \$25,000 to TechFreedom and \$25,000 to the International Center of Law and Economics designated to TechFreedom.¹²⁷ On the same day that Comcast announced its proposed merger, Manne endorsed the merger in a media statement posted on TechFreedom claiming that the merger would not reduce competition.¹²⁸ In April 2014, Manne published a scholarly article arguing that the merger would not be anticompetitive¹²⁹ and

125. Lipton, *supra* note 116.

126. *Id.*

127. See Schedule I to Form 990 Return of Organization Exempt from Income Tax of National Cable & Telecommunications Association 27, 30 (2013), <https://www.documentcloud.org/documents/1710310-ncta-form-990-for-2013-public-inspection-copy.html> (last accessed Apr. 11, 2015).

128. *Comcast/Time Warner Merger Won't Reduce Competition, Actually Expand Net Neutrality*, TECHFREEDOM (Feb. 13, 2014), <http://techfreedom.org/post/76540083322/comcast-time-warner-merger-wont-reduce>.

129. Geoffrey A. Manne, *Beneficence Is Beside the Point: The Antitrust Realities of the Comcast/Time Warner Cable Merger*, 4 CPI Antitrust Chronicle, no. 1, Apr. 2014, <https://www.competitionpolicyinternational.com/file/view/7154>.

also summarized that paper in an article posted on *Turn on the Market*, a blog for academic commentary.¹³⁰ In May 2014, he wrote an article in *Wired* magazine endorsing the deal and pushing back against arguments by “merger naysayers.”¹³¹ And in August 2014, Manne filed a six-page comment to the FCC that resembled an academic paper with detailed analysis in support of the merger.¹³²

At no point did Manne mention that Comcast financially supported two nonprofit organizations he heads. *Wired*, however, included a disclosure indicating, “The author’s work is supported in part by financial contributions from broadband and content providers.”¹³³ At the very least, this disclosure has prophylactic value as it prevents the appearance of corruption. It also enables readers to consider the source of funding when evaluating Manne’s publications and to carefully scrutinize his arguments for any potential bias. Short of direct evidence of someone changing position on an issue, it is admittedly difficult to prove the link between money and influence. But there is ample research in the scientific community on how money can subconsciously influence someone’s thoughts and behavior, which can affect his judgment or decisions.¹³⁴ Even Manne admitted to the *New York Times* that “maybe there is some subconscious thing there” when confirming his financial affiliation with Comcast to the *New York Times*.¹³⁵ It is becoming too familiar of a practice that telecom companies looking to merge will carefully orchestrate astroturf campaigns, which garner support

130. Geoffrey A. Manne, *Why the Antitrust Realities Support the Comcast-Time Warner Cable Merger*, TRUTH ON THE MARKET (Apr. 14, 2014), <http://truthonthemarket.com/2014/04/14/why-the-antitrust-realities-support-the-comcast-time-warner-cable-merger/>.

131. Geoffrey A. Manne, *Actually, the Comcast-Time Warner Merger Doesn’t Hurt Netflix*, WIRED (May 9, 2014), <http://www.wired.com/2014/05/actually-the-comcast-time-warner-merger-doesnt-hurt-netflix/>.

132. Geoffrey A. Manne & Ben Sperry, Comments of International Center for Law & Economics to Fed. Comm’n (Aug. 25, 2014), <http://apps.fcc.gov/ecfs/document/view?id=7521817464>.

133. Manne, *supra* note 129. *Wired* also included the following disclosure in a separate article by Manne on the FCC’s net neutrality rulemaking: “ICLE is supported in part by financial contributions from organizations on both sides of the net neutrality debate.” Geoffrey A. Manne, Opinion, *The FCC’s Net Neutrality Victory is Anything But*, WIRED (Mar. 3, 2015), <http://www.wired.com/2015/03/fcc-better-call-saul/>.

134. David B. Resnick has written substantially on how conflicts of interests can operate at a subconscious level and how “[m]oney can affect research by affecting the judgments, decisions, and actions of individual scientists and research organizations, including private companies, universities, government agencies, or professional societies.” He argues that “[e]veryone—even people with the highest degree of integrity—can be influenced in subtle ways by money.” See DAVID B. RESNICK, *THE PRICE OF TRUTH: HOW MONEY AFFECTS THE NORMS OF SCIENCE* 77–79 (2007).

135. Lipton, *supra* note 115.

for their deals from nonprofit and minority-led groups, to nudge federal regulators to approve their deals.

III. MOVING FORWARD: FILTERING OUT CORPORATE-SPONSORED COMMENTS

One of the largest challenges facing the modern administrative state lies in the sheer volume of public comments it receives, largely through online filing systems like Regulations.gov, or in the FCC's case, an agency's own Electronic Comment Filing System.¹³⁶ This section proposes a financial conflicts of interest disclosure rule to help the FCC distinguish astroturf comments, funded in part by the very parties to a proposed merger, from grassroots comments. If public interest groups also paid commenters to submit comments, those should also be subject to disclosure. But since most public interest groups have less financial resources and less influence over agencies,¹³⁷ the reform in this section targets corporate-sponsored comments. This financial conflicts of interest disclosure rule would help agencies judge the credibility of the public comments it receives. An agency's knowledge concerning financial conflicts of interest increases the value of the comments themselves. On a broader scale, this is relevant because this Administration has taken a strong stance in favor of open government.¹³⁸ Although the FCC is an independent agency outside of the executive branch, the FCC would undermine its own credibility in the eyes of the public to act contrary to, or not be in favor of, such an overarching policy.

On a narrower scale, this reform is particularly relevant because the FCC may pay more attention to sophisticated commenters who submit technical comments than to ordinary commenters who submit a values-based comments without supporting data or analysis. The FCC provides the public with suggestions on how to prepare "effective" comments, and addresses the latter type of unsupported comments by saying, "[w]hile anyone may comment, our ultimate decision has to be reasonable pursuant to the Administrative Procedure Act; we have to provide a basis for our decision and show how

136. See generally Alex Howard, *FCC Looks to Upgrade IT as Net Neutrality Comments Clog System*, TECHREPUBLIC (Sept. 15, 2014), <http://www.techrepublic.com/article/fcc-looks-to-upgrade-it-as-net-neutrality-comments-crash-system/>.

137. See *infra* note 52.

138. Memorandum for the Heads of Executive Departments and Agencies, *supra* note 61 ("My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.").

our rule will achieve its purpose.”¹³⁹ While some might argue that the FCC should not consider unsupported comments at all, even if they are significant in number,¹⁴⁰ I contend that at least when an agency, like the FCC, is mandated to consider how major transactions affect the public interest, it should give a fair shake to ordinary comments expressing values preferences. Such consideration is good for democracy and agency legitimacy. Requiring disclosure of financial conflicts of interest would be a critical move for the FCC in determining the representative balance of preferences, technical or values-based, it receives. By adopting this reform, the FCC would demonstrate integrity in its decision-making process. Without integrity public confidence in the notice-and-comment process will dwindle as people will be unsure of whether agencies actually consider their comments.

A. *Reevaluating Congress’s Public Participation “Check” on Agencies*

In the telecommunications merger review context, as seen from the examples in Part II, money dictates an interested party’s power and influence over agencies. In her book on monopoly power in the telecom industry, Professor Susan Crawford argues that “in the absence of opposition [to the Comcast-NBCU merger] from another large corporation, the tens of thousands of comments filed in support of the public advocates’ views were outweighed by the hundreds of supportive comments from Comcast allies—state and local officials, business groups, and nonprofits.”¹⁴¹ If large corporations seeking merger approval are strategically and systematically outmaneuvering other public advocates in the notice-and-comment process, the public interest mandate has not ensured that the FCC hears public voices and carefully considers public concerns in its merger review.

Although public comments cannot serve as an informal plebiscite on an issue before an agency, they can still affect an agency’s picture of public preferences.¹⁴² Astroturfing risks drowning out other voices within the collective grassroots dialogue, thus giving the FCC a distorted view of public preferences¹⁴³ and impeding the

139. *Rulemaking Process at the FCC*, FED. COMMUN’C COMM’N (last accessed Apr. 13, 2015), <http://www.fcc.gov/encyclopedia/rulemaking-process-fcc>.

140. See Farina, *supra* note 5.

141. CRAWFORD, *supra* note 44, at 215.

142. Mendelson, *supra* note 85, at 181.

143. Mendelson, *supra* note 5, at 1372.

agency's ability to fulfill its public interest mandate. If a corporation uses the public as a microphone to amplify its interest in a public process such as notice and comment, then agencies should be prepared to recognize when comments should be taken at face value, discounted, or ruled out altogether. Knowledge about financial contributions behind the comments will assist agencies in doing this.

For example, if a genuine researcher happens to receive a contribution from an interested party in a telecommunications merger pending FCC review, the FCC should not necessarily rule out her technical data in a comment altogether if it knows about the contribution. Rather, the agency should flag the comment for closer scrutiny of the accuracy of the data in order to determine whether and to what degree the comment should be discounted in the agency's information gathering and analysis. The lack of disclosure, however, might cause the FCC to too readily accept the technical materials in those types of comments. Thus, astroturf comments could be technically misleading as well. The key is for the FCC to smoke out whether financial contributions have influenced the comment and whether it is based on technical data, a policy position, or a values preference.

If rulemaking is a democratic process, then agencies must be expected to exercise reasoned decision-making and to justify their regulatory outcomes.¹⁴⁴ The democratic nature of rulemaking necessarily requires agency officials to consider the *relevant* range of public views and to be fully informed about conflicting interests and values in order to deliberatively choose among them.¹⁴⁵ If the FCC cannot distinguish between astroturf and grassroots comments to a proposed deal, then it is not considering the relevant range of public views to thoughtfully and accurately evaluate the deal's public interest merits. Astroturfing prevents the proper ventilation of genuine public views. Astroturf comments in effect undermine what Congress intended to be a "well-reasoned agency deliberation process,"¹⁴⁶ and at least with respect to the FCC, make its notice-and-comment rulemaking process less democratically legitimate.

Many administrative law scholars agree that federal agencies should redesign public participation systems to improve the quality of comments.¹⁴⁷ A procedural change would make the comments to

144. Farina, *supra* note 5, at 139.

145. *Id.*

146. See Mendelson, *supra* note 85, at 175.

147. *Id.* at 183; see also Farina, *supra* note 5, at 126–27.

the FCC a more representative survey of public preferences regarding a merger, especially given the high costs of opposing the deal. Currently, the commenting process is not effective at informing the FCC of public opinion on large telecom mergers because there are no political advantages for other large corporations to oppose telecommunications mergers; particularly when the company looking to merge is already a large conglomerate, i.e. Comcast.¹⁴⁸ Other major telephone, cable, media, and Silicon Valley companies have remained largely silent in telecom mergers.¹⁴⁹ The media and telecommunications world has become sufficiently consolidated that there is little upside to opposing another deal, particularly if these companies foresaw dealing with the potentially merged entity.¹⁵⁰

Despite their efforts in opposing mergers, public interest groups may fail to persuade the FCC unless the agency has better information about conflicts of interest to enable them to distinguish astroturf from grassroots comments.

B. *Financial Conflicts of Interest Disclosure Rule*

Transparency through disclosure has long existed in the field of medicine and science to help assure the integrity of researchers and research programs that receive government or private funding. Courts and administrative agencies rely on the accuracy and impartiality of the scientific research before them to inform their decisions. In the late 1990s, agencies designed a series of reforms in the medical research setting to offset pressure on researchers and scientists from patent royalties and other sources of remuneration.¹⁵¹ The National Institutes of Health and the National Science Foundation required disclosure of financial interest in connection with grant proposals.¹⁵² The Food and Drug Administration did the same for clinical trials of new drugs and devices.¹⁵³ Peer-reviewed

148. See CRAWFORD, *supra* note 44, at 205.

149. *Id.*

150. CRAWFORD, *supra* note 44, at 215.

151. Sage, *supra* note 81, at 1807–08 n.399.

152. See Responsibilities of Institutions Regarding Investigator Financial Conflicts of Interest, 42 C.F.R. §§ 50.601, 50.604 (1998) (NIH policy mandating conflicts of interest disclosure); Investigator Financial Disclosure Policy, 60 Fed. Reg. 35,820 (1995) (NSF policy mandating conflicts of interest disclosure).

153. See Financial Disclosure by Clinical Investigators, 63 Fed. Reg. 5233-01 (1998) (FDA policy mandating conflicts of interest disclosure).

medical journals often obliged authors to disclose financial interests, which would in turn be disclosed to readers.¹⁵⁴ The underlying justification for this disclosure is that physicians acting as scientists owe fiduciary duties to the public as a whole just as they do as caregivers to individual patients.¹⁵⁵ This intuition still holds true today, as some members of Congress have advocated for the public's right to know about financial ties between doctors and drug companies.¹⁵⁶

Courts also guard against misleading corporate-funded science under the Federal Rules of Appellate Procedure, which require parties to submit corporate disclosure statements.¹⁵⁷ The corporate disclosure rule provides judges with conflicts of interest information to assist them in ascertaining whether recusal is necessary.¹⁵⁸ But the rule also enables judges to explicitly discount compromised research. In 2008, for example, the U.S. Supreme Court in *Exxon Shipping Co. v. Baker*, reviewing a punitive damages award against Exxon from the 1989 Exxon Valdez oil spill, refused to consider seriously the scholarly research Exxon used to argue that jury awards are unpredictable in cases involving large punitive damages.¹⁵⁹ Justice Souter, writing for the majority, stated clearly that “[b]ecause this research was funded in part by Exxon, we decline to rely on it.”¹⁶⁰ Harvard Law Professor Lawrence Lessig noted that the Court’s action in *Exxon v. Baker* might “slow the flow of [corporate-sponsored research] into the judicial process in the future . . .

154. See Sheldon Krinsky & L.S. Rothenberg, *Financial Interest and Disclosure in Scientific Publications*, 280 JAMA 225, 225–26 (1998) (advocating more widespread implementation of disclosure policies by medical journals); see also S. Van McCrary et al., *A National Survey of Policies on Disclosure of Conflicts of Interest in Biomedical Research*, 343 NEW ENG. J. MED. 1621, 1621 (2000) (suggesting current disclosure standards for conflicts of interest disclosure at medical schools, research institutions, and scientific journals may not be adequate to maintain a high level of scientific integrity).

155. *Id.*

156. See, e.g., Press Release, Office of Sen. Chuck Grassley, Grassley, Kohl Says Public Should Know When Pharmaceutical Makers Give Money to Doctors (Sept. 6, 2007) (“[t]here is no question that the drug and device industries have an intricate network of financial ties with practicing physicians . . . [t]his practice, and the lack of transparency around it, can obscure the most important question that exists between doctor and patient: what is best for the patient?”), <http://www.grassley.senate.gov/news/news-releases/grassley-kohl-say-public-should-know-when-pharmaceutical-makers-give-money>.

157. FED. R. APP. P. 26.1.

158. FED. R. APP. P. 26.1, Committee Notes on Rules (as added Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.).

159. *Exxon Shipping Co. v. Baker*, 544 U.S. 471, 501 (2008).

160. *Id.* at 501 n.17 (refusing to rely on corporate-sponsored academic scholarship).

mak[ing] it less likely that the Court would be misled by compromised science.”¹⁶¹

Unlike courts, federal agencies frequently rely upon research “funded in part by” an interested party,¹⁶² so they should at least have the financial conflicts of interest information to decide how much weight to place on such research. In the modern administrative state, there is no rule equivalent to the Federal Rules of Appellate Procedure’s corporate disclosure rule. But there should be for the very reasons Lessig described in the judicial context. If administrative agencies include financial conflicts of interest disclosure rules whenever they seek public comment, they may well “slow the flow”¹⁶³ of corporate-sponsored comments into the administrative decision-making process in the future, making it less likely that agencies would be misled by compromised values, preferences or technical analysis.

Traces of a disclosure rule in the modern administrative state can be found, albeit on an isolated occasion, in relation to the Occupational Safety and Health Administration (OSHA), an agency that mostly “relies on academic and federally funded research studies when conducting risk assessment and determining whether to regulate exposure to a substance.”¹⁶⁴ In September 2013, OSHA extended the financial conflicts of interest disclosure practice, which the NIH, NSF, and FDA already used in other contexts, to an informal rulemaking.¹⁶⁵ Part of this small step towards greater transparency indicates the influence of OSHA chief David Michaels, an epidemiologist well-versed in the dangers of conflicted science and aware of the tobacco industry’s strategy to use science to obscure the basis for the causal link between smoking and cancer.¹⁶⁶

With this background knowledge, OSHA has requested financial conflicts of interest disclosure from anyone submitting scientific or

161. Lawrence Lessig, *The Republican Street Fight Over Transparency in Government*, DAILY BEAST (Mar. 26, 2014), <http://www.thedailybeast.com/articles/2014/03/26/the-republican-street-fight-over-transparency-in-government.html>.

162. *Id.*

163. *Id.*

164. MARC ALLEN EISNER, *REGULATORY POLITICS IN TRANSITION* 156 (2d ed. 2000).

165. Occupational Exposure to Respirable Crystalline Silica, 78 Fed. Reg. 56, 274 (proposed Sept. 12, 2013) (to be codified at C.F.R. pts. 1910, 1915, and 1926), <http://www.gpo.gov/fdsys/pkg/FR-2013-09-12/pdf/2013-20997.pdf>.

166. Lessig, *supra* note 161. In 2008, Michaels published a book called “Doubt is Their Product,” that exposed that the tobacco industry abused research to created scientific uncertainty on the hazards of smoking. See generally DAVID MICHAELS, *DOUBT IS THEIR PRODUCT: HOW INDUSTRY’S ASSAULT ON SCIENCE THREATENS YOUR HEALTH* (2008). Such duplicitous tactics influenced policy decisions on tobacco to the advantage of industry players. See, e.g., *id.*, at xii (“At its heart, this book documents the way in which product defense consultants have

technical comments, as well as comments or testimony on OSHA's scientific and technical analyses for its proposed rulemaking on occupational exposure to silica.¹⁶⁷ For the former group of commenters, OSHA has sought information on the:

(1) [i]dentification of the funding source(s) and sponsoring organization(s) of the research; (2) the extent to which the research findings were reviewed by a potentially affected party prior to publication or submission to the [public] docket, and identification of any such parties; and (3) the nature of any financial relations (e.g., consulting, agreements, expert witness support, or research funding) between investigators who conducted the research and any organizations(s) or entities having an interest in the rulemaking.¹⁶⁸

For the latter group, OSHA has sought information on “(1) [t]he nature of any financial relationships you may have with any organization(s) or entities having an interest in the rulemaking; and (2) the extent to which your comments or testimony were reviewed by an interested party prior to its submission.”¹⁶⁹

Notably, OSHA merely *requested*, but did not *require* anyone to disclose any financial conflicts of interest. Lessig called this move “pretty weak tea” compared to the Supreme Court’s disclosure rule; but, OSHA’s disclosure policy was still a move in the right direction, as it gave policymakers and the public information about possible financial pressures that might skew scientific research.¹⁷⁰ OSHA emphasized that it would still consider *all* of the materials submitted in developing its final rule and supporting analysis, but the agency sought financial conflicts of interest information “to promote transparency and scientific integrity of data and technical information submitted to the [public] record.”¹⁷¹ The agency considered its aim to be “consistent with Executive Order 13563, issued on January 18, 2011, which instructs agencies to ensure the objectivity of any scientific and technological information used to support

shaped and skewed the scientific literature, manufactured and magnified scientific uncertainty, and influenced policy decisions to the advantage of polluters and the manufacturers of dangerous products.”)

167. Occupational Exposure to Respirable Crystalline Silica, 78 Fed. Reg. at 56,274 (revising out-of-date regulations on exposure limits for silica, a well-known culprit of often-fatal lung disease).

168. *Id.*

169. *Id.*

170. Lessig, *supra* note 161.

171. Occupational Exposure to Respirable Crystalline Silica, 78 Fed. Reg. 56,274.

their regulatory actions.”¹⁷² The FCC’s regulatory actions in merger review rely on technological information, so if the Commission required commenters submitting technological comments to disclose any financial conflicts of interest, it would be consistent with Executive Order 13563. But if an agency plans to take all public comments at face value, it should require *all* commenters, not just those submitting technical comments based on scientific data, to include a statement of financial conflicts of interest.

In the agency rulemaking context, what little discussion that exists on the need for a financial conflicts of interest disclosure rule focuses on comments presenting scientific analysis.¹⁷³ Lessig’s proposal that an executive order should mandate all agencies to require commenters to submit financial conflicts of interest disclosures is limited to scientific analysis.¹⁷⁴ An executive order could mandate disclosure of financial conflicts for all commenters, regardless of the substance of their comments, so long as the President issues it to *executive* agencies and political gridlock does not block its passage. In response to the OSHA silica rulemaking disclosure requirement, sixteen Republican senators, led by Senator Lamar Alexander (R-TN), expressed to OSHA their concern that the rule would chill commenters who think OSHA would pre-judge the substance of their comments after learning of their financial backers.¹⁷⁵ If a specific issue like silica could garner sixteen members of Congress to oppose a financial disclosure rule, it is likely that an executive order attempting to apply the rule across all administrative agencies would incite louder protest from members of Congress. The fact that the senators’ letter raised the same

172. *Id.*; Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); *see also* notes 53–54.

173. *See, e.g.*, Lessig, *supra* note 161 (“It takes a willed obliviousness not to recognize just how harmful *interested-science* has been across the history of federal regulation—not always, but sometimes.”) (emphasis added). There has been recent mention that a rule may be helpful, but no further elaboration beyond a mere acknowledgment. Halpern, *supra* note 60, at 10682 (stating that “[disclosure], which allows rule makers to ensure they have a balance of research to consider, should become the norm and be extended throughout the government”).

174. *See* Lessig, *supra* note 161 (concluding that the President should require by executive order, “every agency accepting submissions presenting *scientific analysis* require the authors to include a statement of financial conflicts of interest”) (emphasis added).

175. *See* Letter from Senators to David Michaels, Assistant Sec’y of Labor, OSHA (Nov. 21, 2013) (“[d]isclosing the funding sources of commenters who submit scientific or technical substance of those comments and could result in dissuading stakeholders from even submitting comments”), http://www.help.senate.gov/imo/media/2013_1121_OSHA_silica_letter_FINAL.pdf; *see also* Daniel Cressey, *Tougher Regulations on Deadly Silica Dust Trigger Backlash*, NATURE (Mar. 4, 2014), <http://www.scientificamerican.com/article/tougher-regulations-on-deadly-silica-dust-trigger-backlash/> (quoting Liz Wolgemuth, a spokeswoman for Sen. Alexander: “[t]he chilling effect the financial disclosure could have seems counter to the idea of robust inclusion of a diverse set of ideas and views to inform the rule-making”).

concerns as groups opposing the silica rulemaking, from which the sixteen senators received \$151,266 in the 120 days before they wrote the letter, creates an appearance of impropriety.¹⁷⁶ Rather than wait for an executive order, executive agencies would do well to require by binding rule a statement of financial conflicts of interest. Independent agencies, like the FCC, should do the same. The FCC, for its part, could require a disclosure rule pursuant to its broad authority to review mergers under the Communications Act.

It is even more telling that the chilling effect to which the senators refer as a negative consequence is precisely what those in favor of transparency and public engagement have found admirable about Justice Souter's footnote in *Exxon v. Baker*. Namely, transparency deters third parties funded in part by interested parties from submitting astroturf comments to agencies and helps ensure that the decision maker is less likely to be misled by compromised information. In OSHA's silica rulemaking, the chilling effect argument does not apply as forcefully as it would if OSHA required disclosure, because when disclosure is not mandatory, commenters whose work is funded in part by interested parties would not be dissuaded from filing comments despite their conflicts of interest. In terms of misleading information, there is no difference between the FCC's consideration of corporate-funded comments that express compromised preferences and OSHA's consideration of corporate-funded comments that express compromised research. Both agencies are just as likely to be misled by such comments in the absence of a disclosure rule. And as Crawford documented, hundreds of supportive comments from Comcast allies mattered more to the FCC than tens of thousands of comments submitted by public advocates during the comment period for the Comcast-NBCU merger.¹⁷⁷

Some might respond that ordinary individuals should not have the same aforementioned duty of care as physicians and scientists owe to the public. Yet, at least in the FCC context, the Commission does not need to rely on a duty of care to justify requiring disclosure. Rather, the FCC could determine that the disclosure is necessary to achieve its public interest mandate. The same lack of transparency that concerned the Supreme Court in *Exxon v. Baker* and OSHA in its 2013 silica rulemaking, should also concern the FCC in merger review. Data, analysis, and values preferences from

176. Jay Costa, *Senators Criticizing Conflict of Interest Disclosure Surrounding OSHA Ruling Receive Timely Contributions from Rule's Opponents*, MAPLIGHT (Mar. 24, 2014), <http://maplight.org/content/73438>.

177. See *supra* note 141.

commenters whose work has been funded in part by the very industry players whose conduct the agency is scrutinizing should be considered with a grain of salt—or in the Court’s view, should not be considered at all lest government actors be misled. Yet, since OSHA’s 2013 silica rulemaking, no other agency has sought such financial conflicts of interest disclosure.

C. Building Norms in the Administrative State, the Media & the Public

One possible criticism to agencies requiring a statement of financial conflicts of interest from anyone submitting a comment is that it is difficult to enforce because it relies on commenters to self-report and it would be too costly to dedicate agency resources to double check every submission for failure to disclose. Yet agencies can develop new norms. A biologist, for example, likely knows that medical and scientific journals oftentimes require conflict of interest disclosure information. And an advocate before the Supreme Court knows that the Federal Rules of Appellate Procedure require conflict of interest disclosure information. Likewise, the public can come to expect agencies to require conflict of interest disclosure information as the ordinary course of business in agency decision-making that includes public participation. General counsel’s offices of corporations and nonprofit organizations will prompt these entities to comply with agency rules.

If the norm is to submit a statement disclosing conflicts of interest along with a comment to an agency, then omissions will be the exception, and the agency could publicize that they will not consider comments that lack disclosure statements. It is a federal crime for a person to knowingly and willfully make false or fraudulent statements, or conceal information regarding any matter within the jurisdiction of the federal government, even by mere denial.¹⁷⁸ This should deter commenters from failing to comply with the disclosure rule. Finally, public opinion can also deter commenters from failing to disclose their financial conflicts of interest. The media can serve a crucial function as watchdogs that sniff out astroturf, thereby shaping public opinion about individuals and organizations who present themselves as independent and objective sources before an agency, but who actually receive funding from the very industry players they endorse.

For example, in 2013, *Mother Jones* broke a story revealing the financial backers of the American Council of Science and Health

178. 18 U.S.C. § 1001.

(ACSH),¹⁷⁹ a nonprofit advocacy organization that proclaims to “protect[] consumer freedom from a variety of unscientifically based activist organizations—such as the Natural Resources Defense Council, the Center for Science in the Public Interest, and the Environmental Working Group—that use ‘junk science’ and hyperbole about risk to promote fears about our food, pharmaceuticals and chemicals, and other environmental and lifestyle factors.”¹⁸⁰ ACSH has often taken industry-friendly positions on public health issues, including publicly defending fracking, opposing mandatory nutrition labeling requirements and New York City’s attempted ban on big sodas, and dismissing concerns about the potential harms of BPA and pesticides.¹⁸¹ The nonprofit did not disclose its backers because it found “the sources of [its] support are irrelevant to [its] scientific investigations.”¹⁸² But a leaked internal financial report from 2013 indicates that ACSH financially depends heavily on parties that have a large stake in the very public health debates it shapes.¹⁸³

Similarly, in the telecommunications industry, the Center for Public Integrity,¹⁸⁴ the *New York Times*,¹⁸⁵ *Politico*,¹⁸⁶ the *Wall Street Journal*,¹⁸⁷ and the *Washington Post*,¹⁸⁸ have all reported on AT&T’s and Comcast’s financial backing of nonprofit groups that support their brand and their proposed mergers. Public focus on an issue places pressure on industry regulators like the FCC to take care in their decision-making process: regulators know the public will pay close attention to the outcome they reach. In this sense, the public relies heavily on the media for its investigative reporting. Public

179. Andy Kroll & Jeremy Schulman, *Leaked Documents Reveal the Secret Finances of Pro-Industry Science Group*, MOTHER JONES (Oct. 28, 2013), <http://www.motherjones.com/politics/2013/10/american-council-science-health-leaked-documents-fundraising>.

180. ABOUT THE AMERICAN COUNCIL ON SCIENCE AND HEALTH, <http://acsh.org/about-acsh> (last visited Nov. 7, 2015).

181. Kroll & Schulman, *supra* note 179.

182. *Id.* (quoting ACSH’s executive director Dr. Gilbert Ross).

183. *American Council on Science and Health FY 2013 Financial Update*, MOTHER JONES (2013), <http://www.motherjones.com/documents/809483-acsh-financial-summary>.

184. McLure, *supra* note 104.

185. See Lipton, *supra* note 115; Lipton, *supra* note 116.

186. Krigman, *supra* note 76; Boliek & Zapler, *supra* note 111.

187. Amy Schatz, *Comcast Restores Nonprofit’s Funding After Tweet Dust-Up*, WALL ST. J.: WASHINGTON WIRE (May 19, 2011, 1:39 PM), <http://blogs.wsj.com/washwire/2011/05/19/comcast-restores-nonprofits-funding-after-tweet-dust-up/> (reporting on an incident where Comcast Vice President of Communications Steve Kipp wrote an email to a nonprofit threatening to pull its funding after the nonprofit posted a negative tweet about Comcast with reference to the company’s NBC merger).

188. See Cecilia Kang, *AT&T Ramps Up Lobby For Proposed T-Mobile Merger*, WASH. POST (May 31, 2011), http://www.washingtonpost.com/business/economy/atandt-ramps-up-lobby-for-proposed-t-mobile-merger/2011/05/31/AGYcGmFH_story.html.

hostility towards certain nonprofit advocacy groups like ACSH or industry players with a heavy invisible hand in influencing public debate colors the reputations of such groups and players, and chips away at the integrity of their brand. Disclosure requirements might facilitate the media in its investigative reporting on hidden money influencing public policy. If the media consistently uncovers these types of stories, then such transparency might serve to make corporate-sponsored comments less misleading, and in turn make it less common for industry players to call upon nonprofit groups to advocate on their behalf.

CONCLUSION

This paper aims to resolve a small issue—how the FCC should deal with corporate-sponsored comments, or astroturf, when it seeks grassroots comments—in a larger problem, which is how agencies should deal with the significant amount of comments that they receive for high-profile rulemakings or transactions requiring approval. But the solution I propose in this Note has a far-reaching application. Every administrative agency should care about the integrity of the comments it receives and in turn relies on to make its decisions on regulatory policies. Thus, the benefits to flagging astroturf comments that appear to be independent and objective are not limited to the FCC.