

## Receivers, Interference and Regulatory Options: A Silicon Flatirons Roundtable

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### Policy Development Options

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This table surveys four potential processes for developing receiver policy. The four options vary in process - in their disclosure requirements, speed, transparency, and flexibility - as well as in the force of their outputs. Each option has its own potential advantages and disadvantages to be analyzed when deciding how to move forward with interference management policy.

	<b>Advantages</b>	<b>Disadvantages</b>
<b>Notice and Comment Rulemaking</b>	<ul style="list-style-type: none"> <li>- Traditional and well understood</li> <li>- Decisions based on the record aspire to transparency</li> </ul>	<ul style="list-style-type: none"> <li>- Slow</li> <li>- Inflexible</li> <li>- Favors sophisticated parties familiar with process</li> <li>- <i>Ex parte</i> meetings limit transparency</li> </ul>
<b>Federal Advisory Committee</b>	<ul style="list-style-type: none"> <li>- Knowledgeable participants can help shape policy goals</li> <li>- Public disclosure allows for transparent policy decisions</li> </ul>	<ul style="list-style-type: none"> <li>- Disclosure and openness requirements can be burdensome</li> <li>- Recommendations require additional process to gain force of law</li> </ul>
<b>Negotiated Rulemaking</b>	<ul style="list-style-type: none"> <li>- Allows affected parties to craft proposed rule</li> <li>- Disclosure requirements maintain transparency</li> <li>- Reduced litigation risk from regulated parties</li> <li>- Can be faster than Notice and Comment Rulemaking in generating final rules</li> </ul>	<ul style="list-style-type: none"> <li>- Adds process to the Notice and Comment Rulemaking, allowing for additional disruptions to consensus</li> <li>- Negotiations potentially introduce new sources of conflict</li> <li>- Parties left out of negotiations may have heightened sensitivity to adverse outcomes</li> </ul>
<b>Multi-Stakeholder Organization (MSHO)</b>	<ul style="list-style-type: none"> <li>- MSHOs are more flexible than traditional rulemaking bodies, allowing for a tailored approach to specific issues</li> <li>- Can address issues more quickly than traditional process</li> <li>- Collegial approach fosters collective problem solving, especially on technical issues</li> </ul>	<ul style="list-style-type: none"> <li>- Lack of single authority potentially prevents progress on intractable disputes</li> <li>- Potentially diminished disclosure and transparency</li> <li>- Reliance on community practice or other soft mechanisms for enforcement means MSHOs may be better suited for technological rather than legal disputes</li> <li>- Difficult to represent nascent or diffuse interests</li> </ul>

	<b>Notice and Comment Rulemaking</b>	<b>Federal Advisory Committee (FAC)</b>	<b>Negotiated Rulemaking</b>	<b>Multi-Stakeholder Organization (MSHO)</b>		
<b>Background</b>	Administrative Procedure Act <sup>1</sup> controls Notice and Comment rulemaking, the most common regulatory process at the FCC.	The Federal Advisory Committee Act of 1972 (FACA) <sup>2</sup> formalized the process by which advisory committees interact with the Federal Government. Designed to reduce spending on unnecessary committees and bring transparency to their process.	The Negotiated Rulemaking Act of 1990 <sup>3</sup> created the framework for interested parties to negotiate a proposed rule in and Notice and Comment rulemaking proceeding.	MSHOs generally function outside the purview of government, allowing interested parties to create standards, best practices, and codes of conduct. Process and outputs vary widely.		
<b>Examples</b>	- Preserving the Open Internet Broadband Industry Practices <sup>4</sup>	- Open Internet Advisory Committee <sup>5</sup> - FCC Technological Advisory Council	- Allocation of Little LEO <sup>6</sup> - Allocation of Big LEO <sup>7</sup>	BITAG	ICANN	IETF
<b>Output</b>	Legally enforceable regulations	Guidance and advice in the form of a report. Requires additional process (e.g. Executive Order, Notice and Comment rulemaking) to gain force of law.	Legally enforceable regulations	Generating best practices in network management, advisory opinions	Coordination and assignment of IP addresses, DNS management, etc.	Internet standards, particularly TCP/IP protocol

<sup>1</sup> 5 U.S.C. §§ 551-59.

<sup>2</sup> 5 U.S.C. App. 2.

<sup>3</sup> 5 U.S.C. §§ 561-570a

<sup>4</sup> See Preserving the Open Internet Broadband Industry Practices, *Report and Order*, GN Docket No. 09-191, 25 FCC Rcd 17905 (2010).

<sup>5</sup> See Preserving the Open Internet Broadband Industry Practices, *Public Notice*, GN Docket No. 09-191, 27 FCC Rcd 5779 (2012).

<sup>6</sup> See Establish[ing] Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile Satellite Service, *Report and Order*, CC Docket No. 92-76 (1993).

<sup>7</sup> See Establish[ing] Rules and Policies Pertaining to a Mobile Satellite Service in the 1610–1626.5/2483.5-2500 MHz Frequency Band, *Report and Order*, CC Docket No. 92-166, 9 FCC Rcd 5936 (1994).

	Notice and Comment Rulemaking	Federal Advisory Committee	Negotiated Rulemaking	Multi-Stakeholder Organization
<b>Triggering</b>	A proceeding is started either by petition or under the FCC's own initiative.	The language of FACA defines an Advisory Committee as "any committee, board, commission . . . or other similar group . . . which is . . . established or utilized by one or more [Federal] agencies . . ." <sup>8</sup> The Supreme Court interpreted this language narrowly <sup>9</sup> , and subsequent D.C. Circuit decisions have required either actual government establishment of the committee (for the 'established' clause) or that the group be "amenable to . . . strict management" by the executive branch (for the 'utilized' clause). <sup>10</sup>	Before commencing a negotiated rulemaking, the agency must show: <ul style="list-style-type: none"> <li>- a need for a rule</li> <li>- limited number of affected interests</li> <li>- a balanced committee can be convened that will negotiate in good faith</li> <li>- likelihood of consensus</li> <li>- negotiations will not result in unreasonable delay</li> <li>- the agency will commit required resources</li> <li>- the agency will use the consensus as the proposed rule for Notice and Comment. <sup>11</sup></li> </ul>	MSHOs tend to arise in response to technical problems an industry faces collectively. Assuming FACA is not triggered, stakeholders can create MSHOs as they see fit.

<sup>8</sup> 5 U.S.C. App. 2 § 3(2). FACA has similar definitions for any group established by statute or established or utilized by the President.

<sup>9</sup> Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989). Although the Court made clear that a literal reading of the statute's definition of an advisory council was impermissibly broad, it also clarified that the party that formed the group is not determinate: "the statute's 'or utilized' phrase was intended to clarify that FACA applies to committees 'established . . . by' the Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations 'for' public agencies as well as 'by' such agencies themselves." 491 U.S. at 442.

<sup>10</sup> See Center for Arms Control and Non-Proliferation v. Pray, 531 F. 3d 836, 840, (D.C. Cir. 2008) discussing Animal Legal Defense Fund v. Shalala, 104 F.3d 424, 430-31 (D.C. Cir. 1997) ("the utilized test is a stringent standard, denoting something along the lines of actual management or control.") and Byrd v. EPA, 174 F.3d 239, 245-48 (D.C. Cir. 1999) ("participation by an agency or even an agency's significant influence over a committee's deliberations does not qualify as management and control such that the committee is utilized by the agency under FACA.") (quotation marks omitted).

<sup>11</sup> 5 U.S.C. § 563.

	Notice and Comment Rulemaking	Federal Advisory Committee	Negotiated Rulemaking	Multi-Stakeholder Organization		
<b>Process</b>	In a typical agency rulemaking, a record of public comment is developed in response to a proposed rule. The agency then develops a final rule based on that record. At the FCC, the record is often supplemented by <i>ex parte</i> communications.	Federal Advisory Committees are required to publish advanced notice of their meetings, <sup>12</sup> which are open to the public. <sup>13</sup> FACA also imposes a number of disclosure requirements: detailed meeting minutes as well as any documents discussed or produced must be made available to the public. <sup>14</sup> FACs must have an employee of the Federal Government with the power to adjourn meetings. <sup>15</sup> FACs frequently have subcommittees or working groups that are <i>not</i> subject to these requirements; however, these working groups are only allowed to interact with their parent FAC and not directly with a Federal officer or agency. <sup>16</sup>	The Negotiated Rulemaking process is a combination of a Notice and Comment proceeding and a Federal Advisory Committee. The agency releases a public notice announcing the intent of to establish a ‘negotiated rulemaking committee’ (under FACA). <sup>17</sup> Parties submit applications for membership as well as comments on other potential members. <sup>18</sup> The agency then establishes the negotiating Advisory Committee, which produces a consensus report under the requirements of FACA. <sup>19</sup> This report serves as the proposed rule going forward in traditional notice and comment process. <sup>20</sup>	BITAG’s Technical Working Group takes up network management issues either by majority vote or petition from an individual or the government. A committee is formed from the pool of members which generates a report, usually within four months. <sup>21</sup>	ICANN, a non-profit organization, has an elected, 16-member board that reviews reports on recommendations generated by its supporting organizations. <sup>22</sup>	The IETF does not have a formal structure or board; it is composed of mostly volunteer engineers who complete most of their work through email. Request for comment documents are circulated in order to generate a “rough consensus” on standards and best practices. <sup>23</sup>

<sup>12</sup> 5 U.S.C. App. 2 § 10(a)(2).

<sup>13</sup> 5 U.S.C. App. 2 § 10(a)(1).

<sup>14</sup> 5 U.S.C. App. 2 §§ 10(b)-(c).

<sup>15</sup> *Id.*

<sup>16</sup> 41 C.F.R. § 102-3.35(a).

<sup>17</sup> 5 U.S.C. § 564(a).

<sup>18</sup> 5 U.S.C. § 564(b).

<sup>19</sup> See 5 U.S.C. § 566 for other conduct guidelines.

<sup>20</sup> 5 U.S.C. § 566(f). If no consensus is reached, the committee submits a report specifying those areas where consensus was reached and any other relevant information. Any member may include an addendum to the report with additional information.

<sup>21</sup> Kaleb A. Sieh and Dale N. Hatfield, *The Broadband Internet Technical Advisory Group (BITAG) and Its Role in Internet Governance* 16 (Sept. 20, 2012) (unpublished manuscript) (*available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2032233](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2032233)).

<sup>22</sup> *Id.* at 6-7. See also JOE WAZ AND PHIL WEISER, *INTERNET GOVERNANCE: THE ROLE OF MULTISTAKEHOLDER ORGANIZATIONS* (Silicon Flatirons Report 2012).

<sup>23</sup> Sieh and Hatfield, *supra* note 20, at 5-6.

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<sup>24</sup> This point is disputed and difficult to measure. At least one academic has concluded that although Negotiated Rulemaking may be concluded faster than a Notice and Comment rulemaking, these claims may be overstated and negotiations frequently require more total hours committed to the project. Cary Conglianese, *Assessing Consensus*, 46 DUKE L.J. 1255, 1279-86 (1997).

<sup>25</sup> *Id.* at 1322-25.

<sup>26</sup> *Id.* at 1324.

<sup>27</sup> *Id.* at 1325.