Chapter 8.
Regulatory Reputation

8.1 Introduction

The preceding chapters have demonstrated that when it comes to understanding why network operators have foregone application-specific traffic management, the subtleties of the regulatory environment were more influential than the presence of competition. In the US, the history between the regulator and the operators and the threat of regulation created through the FCC's initial forays into net neutrality policy created a deterrent against discrimination, while intense competition and regulatory permissiveness in the UK spurred adoption of application-specific management. Understanding why, as a general matter, a particular national broadband market is or is not characterized by widespread discriminatory conduct therefore requires understanding the roots of regulators' approaches. What is it about the FCC and the US regulatory environment that led the agency to intervene in formal and informal ways? What is it about Ofcom and the UK regulatory environment that caused the regulator to forbear from any significant intervention? The answers to these questions provide rich new data to allow the extension of theoretical frameworks concerning industry regulation. They are the subject of this chapter and the one that follows.

Because the FCC and Ofcom differ along so many dimensions, the key task of a comparative inquiry is to identify which of the differences help explain the regulators' approaches to traffic management. The first section below provides a brief sketch of the surface characteristics that differentiate the two agencies: governance structure, age, remit, core competency, politicization, and independence. These differences fall across the spectrum of categories of explanations for regulatory behavior outlined in Chapter 3: institutional design choices, external forces, internal agency characteristics, and nation-specific factors. The rest of this chapter and Chapter 9 focus on three particularly salient lenses through which the behavior of the FCC and Ofcom can be understood based on the evidence gathered in this study. The first is reputation, an internal agency characteristic that plays vastly different roles

within each of the two regulators and is closely intertwined with institutional design choices about agency governance structure and the politicization (or lack thereof) of each agency. That is the subject of this chapter. The influence of judicial review (or more precisely the regulator's approach to litigiousness) and the presence or absence of interest groups are examined in Chapter 9.

8.2 Differences Between the FCC and Ofcom

The FCC was established in 1934 with the broad remit of "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" (47 U.S.C. 151). It is the agency that sets national telecommunications policy (Shaffer and Jordan 2013). It has both legislative-style rulemaking authority and judicial-style adjudication authority. It operates as a five-member commission (reduced from seven in 1983), with commissioners appointed by the President and confirmed by the Senate for five-year terms (reduced from seven years in 1986) with a three-term limit. No more than three commissioners share the same political affiliation and all Commission rules and adjudications require affirmative votes from the majority of commissioners. The chairman is designated by the President and is generally expected to serve for a single Presidential term, although on average FCC chairmen have served for just 2.7 years (FCC 2013). The FCC staff, by contrast, tend to be primarily civil servants whose average length of employment exceeds 15 years (U.S. Office of Personnel Management 2013). Since 2001, the FCC has been consistently staffed with approximately twice as many lawyers and other legal professionals as engineers and about ten times as many legal professionals as economists (Marcus and Schneir 2010; U.S. Office of Personnel Management 2013).

As with a number of other agencies created during the New Deal era, the FCC was established as an independent expert agency – "independent in the sense that, while it is

subject to laws passed by Congress and court decisions, most of its actions cannot be directly overruled by the President through the administrative process" (Taylor 2006, 264). Despite this designation, for decades the agency has been broadly understood as a highly politicized, contentious organization (Napoli 1998). Whether observers attribute this politicization to the influence of Congress, the executive branch, industry sectors, or all of the above, all agree that a substantial portion of the Commission's decisions involve what Weiser calls "political deal-making and rewarding those with influence" (2009, 6) (see also Cowhey, Aronson, and Richards (2009), Geller (1974), Horwitz (1989), and Napoli (1998)). Among the major federal independent regulatory commissions, the FCC has the highest rate of commissioner dissents (Ho 2007).

Ofcom is different in many ways. It is far younger, having been created in 2003 as a converged regulator to replace five existing sector-specific regulators with oversight over broadcasting, television, radio, and telecommunications. It was deliberately organized as a commercial entity would be, with a chief executive and executive team who run the organization day-to-day and a board that oversees the executives. Board members, including the chairman, are selected by the Secretary of State to serve for individually specified terms that may be renewed. Although the majority of Ofcom's budget is allocated by the government, it operates much like a private sector entity, with a significant portion of both executives and staff drawn from industry and salaries offered on scales competitive with the private sector (House of Commons 2007; House of Commons 2009; House of Commons 2011b; House of Commons 2011a; Ofcom 2004a; Prosser 2010). Unlike the FCC, Ofcom employs more professional economists than lawyers (Marcus and Schneir 2010).

The Communications Act 2003 tasked Ofcom with two principal duties: "(a) to further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition" (c. 21, s. 3(1)). The citizen-oriented duty was a very contentious addition to Ofcom's enacting legislation, however, and debate has continued since Ofcom's creation about whether the agency has

taken too much of an economic regulator's approach while neglecting its mandate to protect citizens' interests (Gibbons 2005; Livingstone 2008; Lunt and Livingstone 2012; Prosser 2010; P. Smith 2006).

While Ofcom has been responsive to government, particularly as it relates to managing the agency's budget, its individual regulatory decisions related to telecommunications tend to be less politically charged than those of the FCC. The Ofcom board operates by consensus unless a member insists on a vote, in which case only the vote count but not individual members' votes are made public (Ofcom 2013a). Ed Richards, a former Tony Blair staffer, was named Ofcom CEO under Tony Blair's Labour government but has continued in his role for years after the Conservatives came to power. On matters of telecommunications policy in the EU, Ofcom and the UK government often support distinct (although not always contradictory) positions to each other.

As discussed in Chapter 3, some scholars have emphasized the linkages between the sorts of structural characteristics described here and regulatory outcomes. While these characteristics formed the foundations upon which the two telecommunications regulators constructed their varying approaches to net neutrality and traffic management, they do not provide complete explanations for the many puzzles of regulatory behavior presented by the FCC and Ofcom. For example, despite being organized as an evidence-based, politically insulated agency, Ofcom did not seek to intervene with traffic management regulation when presented with evidence of discrimination. The FCC, despite having a much less technocratic orientation than Ofcom, reached far deeper into the intricacies of traffic management. To understand these kinds of nuances, a better grasp of the informal aspects of the respective regulatory environments is necessary. The next section begins that analysis by focusing on reputation.

8.3 The Role of Reputation

Chapter 3 highlighted a body of scholarly work that has considered reputation as central to understanding regulatory outcomes. In particular, Daniel Carpenter conceptualized regulation as the product of "the imperfect human official motivated neither by neutral competence nor by monetary enrichment nor by raw empowerment, but by status, esteem, legitimacy, and reputation" (2010, 43). He and others sought to tease out how agencies could develop their own power and autonomy by cultivating organizational reputations with key audiences and how the influence of individual reputations within an agency could reinforce or detract from the agency's image (Carpenter 2001; Carpenter 2010; Russell and Shelton 1974; Wilson 1989).

Reputation provides a way for the differences in approach to traffic management between the US and the UK to be understood. Neither of these agencies are immune to political pressures, but the fact that those pressures are brought to bear within differing reputational frameworks resulted in substantially divergent responses, as explained in this section.

8.3.1 FCC

Despite its collegial structure, the FCC is an agency that is centered around its chairman. Chairmen have tremendous influence over the Commission's agenda, the regulatory tools used to address specific policy issues, and the speed with which proceedings get resolved. They cannot fully control which matters will come before them as a result of stakeholder petitions, technological advancements, or congressional directives, but they can choose how swiftly or how forcefully to react; as one interviewee put it, "the chair has the power of deciding what won't get done." From 1976 to 2003, chairmen voted to affirm FCC decisions 97% of the time, demonstrating the extent of their control over which work the Commission completes (Candeub and Brown 2008).

As a result of this institutional design that vests the chair with such significant control, the primary reputational concern that affects the work of the FCC is that of individual reputation,

not of organizational reputation. Chairmen are judged on their individual merits by the Washington political class because their actions are viewed as being highly determinative of what the FCC accomplishes. The public's perception of the FCC and its long-term health are not main concerns; rather, "the FCC is composed of serial mini-administrations, each of which leave their stamp on media and communications policy" (Taylor 2006, 275). Although they lack the same means of controlling the agenda as the chair, individual commissioners also develop specific reputations in the course of their work at the agency, at times using not just dissenting votes but also concurring statements to speak to particular constituencies or provide distinctive views (Candeub and Brown 2008).

For chairmen, the drive to leave their stamp on the agency's work is reinforced by their short tenures. Unlike a corporation with a CEO who is invested in developing a successful organization in the long term, the FCC attracts a series of leaders who arrive knowing that they have a few years at most to accomplish their individual policy goals. As an organization, the FCC certainly has a reputation – mostly for incompetence, delay, short-sightedness, internal strife, and a raft of other deficiencies (Geller 1974; Hundt and Rosston 2006; Napoli 1998; Weiser 2009) – but improving how the agency is regarded as an organization is not generally high on any chairman's list of priorities. That individual reputation trumps FCC reputation is not meant to imply that chairmen pursue their work narcissistically, but that they focus their short tenures on the substantive policy outcomes that they most desire to be associated with, rather than on how those outcomes fit into longer range objectives for the FCC as a regulatory body.

This is not to say that the chair can ignore the opinions of the other commissioners, but the need for the chair to make significant, substantive compromises in order to achieve the broad outlines of his desired outcome in any given FCC proceeding is most relevant when fewer than five commissioners are voting (whether because one or more commissioner seats are vacant or as a result of a recusal). Most orders are adopted unanimously (Candeub and Brown 2008; Ho 2007), but on divisive issues, the chairman's key task is to find support among at

least two of his fellow commissioners. With a full commission voting he can often find that support either from the other two commissioners of his party or by appealing to the personal interests and idiosyncrasies of the opposing-party commissioners (Candeub and Brown 2008). More significant compromise occurs in cases where fewer than five commissioners are voting, because any two commissioners who disagree with the chairman have enough leverage to spur a negotiation. His political skill matters.

The conception of the FCC as described here – as an agency largely controlled by its chairman, affected by how the chairman wishes to be perceived, but susceptible to policy compromises resulting from the vagaries of commissioner appointment schedules and recusals – explains much about the agency's approach to traffic management. The following sections illustrate this by examining the actions of the two chairmen who presided over the bulk of the FCC's involvement in traffic management regulation up to 2011: Kevin Martin and Julius Genachowski. Other FCC officials certainly played critical roles in shaping the traffic management landscape in the US, particularly Martin's predecessor Michael Powell and former Commissioner Michael Copps. The examinations of Martin and Genachowski presented here can be considered as case studies that illustrate the overall reputational dynamic that characterizes the FCC.

Kevin Martin

By the time Kevin Martin was named FCC chairman in March 2005, his credentials as a conservative political insider were well established. He had worked for George W. Bush's presidential campaign, including helping with the Florida vote recount after the 2000 election; for FCC commissioner Harold Furchtgott-Roth, by some estimates the most conservative FCC commissioner ever to serve (Ho 2007); and for Kenneth Starr, the independent counsel who led the investigation into the Monica Lewinsky affair. But rather than being marked by obvious partisanship or a characteristic conservative taste for deregulation, Chairman Martin's tenure at the FCC provides an extraordinary example of the extent to which an individual chairman's personal pursuit of a particular reputation as a regulator can leave an

imprint on FCC policy, modulo the political exigencies of the time. By reinterpreting one broadly popular narrative about Chairman Martin – that he disliked the cable industry – this section demonstrates how both the power and the limitations of an agency driven by individual reputational concerns affected traffic management policy.

The disputes between Chairman Martin and the cable industry were many and varied during his time at the Commission. He denied cable companies' petitions for waivers to use low-end set-top boxes while granting similar waivers to telephone companies entering the TV business (Baumgartner 2008); he tightened cable's media ownership rules while relaxing them for broadcasters and newspapers (Davidson 2008; Labaton 2007); he repeatedly pressured the cable industry to offer "à la carte" or per-channel pricing (Davidson 2008), at times using questionable procedural maneuvers that sparked outrage in Congress (House Energy and Commerce Committee 2008; Weiser 2009); and, most relevantly, he authored the order that required Comcast to cease its discriminatory traffic management (FCC 2008). The assessments of Martin's tenure offered by interviewees from both government and industry echoed those that often appeared in the press during his time as chairman (Eggerton 2009; Lasar 2008; Ulaby 2008): that "from the beginning, [he] didn't like cable," that he had an "anti-cable approach," and that "cable companies were guilty until proven innocent" during his tenure. Speculation in the industry and in the press was that his apparent bias resulted from his personal objections as a conservative to what he viewed as overly indecent content on cable television, which was subject to far more lenient content regulation than broadcast (Davidson 2008; Lasar 2008).

Many interviewees offered his animosity towards cable as the key explanation for the *Comcast Order*. One cable policy executive explained that the relationship between Martin and the cable industry had "soured" and that "the Comcast situation was in large part a reflection on that relationship as opposed to the substance of the net neutrality debate." A former FCC staffer was more blunt: "he had a complete vendetta against the cable industry, he caught them with their pants down, and he wanted any reason to nail them."

At the time, the "attack-on-cable" explanation certainly seemed more plausible than any policy-based reasoning for what appeared to be a dramatic reversal of course and a significant regulatory intervention. When the Commission adopted the *Internet Policy Statement* in 2005, Martin explained that "policy statements do not establish rules nor are they enforceable documents" (Martin 2005). When compliance with the *Policy Statement* principles was included as a merger condition in the SBC/AT&T and Verizon/MCI mergers several months later, Martin stated: "I do not believe that all of the conditions imposed today are necessary" (Martin 2005c, 2). And when the AT&T/BellSouth merger was approved the following year with even stronger nondiscrimination requirements, Martin's distaste for regulatory intervention in this area was palpable:

> Some of the conditions will certainly provide additional consumer benefits. . . . Other conditions, however, are unnecessary and may actually deter broadband infrastructure investment. The conditions regarding net-neutrality have very little to do with the merger at hand and very well may cause greater problems than the speculative problems they seek to address. These conditions are simply not warranted by current market conditions and may deter facilities investment. Accordingly, it gives us pause to approve last-minute remedies to address the ill-defined problem net neutrality proponents seek to resolve. . . . Importantly, however, while the Democrat Commissioners may have extracted concessions from AT&T, they in no way bind future Commission action. . . . For example, today's order does not mean that the Commission has adopted an additional net neutrality principle . . . although AT&T may make a voluntary business decision, it cannot dictate or bind government policy. Nor does this order. (Martin and Taylor Tate 2006, 2)

Despite what seemed to be his clear opposition to intervention and his contention that the *Policy Statement* was unenforceable, when the allegations about Comcast's handling of peer-to-peer traffic surfaced in 2007 and petitions for action were filed with the FCC, Martin responded aggressively. He sought comment from the public, organized a series of hearings that elicited testimony from neutrality advocates and embarrassing revelations from Comcast, and made provocative public statements about Comcast's behavior (Martin 2008b). All of this activity culminated in the Commission's adoption of the *Comcast Order*, which bound Comcast to a significantly higher nondiscrimination standard than that in the *Policy Statement*. The *Order* required the company to transition to nondiscriminatory network management practices that "further a critically important interest" and are "narrowly or

carefully tailored to serve that interest" (FCC 2008, 28) – a standard that the chairman openly admitted to have borrowed from the extremely stringent legal test known as "strict scrutiny" (Martin 2008b), which is applied when the government seeks to limit what would otherwise be protected individual speech under the First Amendment. Other than by fining Comcast, which the Commission declined to do, it is difficult to conceive how the result of the *Comcast* proceeding could have been more interventionist within the confines of an enforcement action. The former FCC staffer explained his perplexity:

> I've never seen him angrier than . . . AT&T/BellSouth and he wrote that blistering statement about how this is the most appalling thing and this net neutrality concept will ruin earth as we know it, and then eight months later or whatever it was, he had totally flip-flopped. . . . It was a measure of how eager he was to stick it to the cable industry that he would use this weapon, that you'd think would be the last one he'd want to use.

But Martin repeatedly denied that he was out to disadvantage cable or favor its competitors, arguing instead that his actions were motivated by a desire to deliver lower prices to consumers and to create regulatory parity between the cable and telephone industries so as to spur competition (Davidson 2008; Eggerton 2009; Lasar 2008; Martin 2007a). The latter goal was of particular relevance to net neutrality policy, as it was bound together with changes to the regulatory classifications of DSL and cable broadband. With the publication of the *Wireline Broadband Order*, which removed the remaining common carrier obligations on DSL broadband providers and thereby created regulatory parity with cable broadband, Chairman Martin celebrated the achievement of his long-standing goal of ending the "regulatory inequities" between cable and DSL: "As I have said on numerous occasions, leveling the playing field between these providers has been one of my highest priorities" (Martin 2005b, 1). In the press and before Congress he often reiterated his desire for both industries to be treated equally, including by enforcing broadband nondiscrimination in the Comcast case as had been done in the case of Madison River (Lasar 2008; Martin 2007a; Martin 2008c). This makes sense in light of how different the regulatory histories of the two industries had been, as explained in Chapter 5.

A deeper analysis of Chairman Martin's actions and statements combined with the perspectives of the regulatory and political actors who surrounded him reveals a more coherent explanation for his actions than those of a cable adversary or relentless equalizer: Chairman Martin wanted to do as little as possible to constrain ISPs' behavior ex ante, but wanted to retain the right to discipline them ex post if they contravened his vision of how Internet service should be offered. This approach combined the conservative ideals of regulatory restraint and strong enforcement. His pursuit of this approach was, by necessity, shaped by the political exigencies of the time, but at each step in the development of net neutrality policy in which he was involved, he sought as best he could to make the industry aware of the potential for FCC intervention – but not to intervene ex ante. A senior FCC official explained the message that Martin sought to send to the ISPs: "Hey, we are going to watch this. These are certain principles we're going to follow. And you've got to follow these guidelines, and if you get out of line, then people can complain, and we can take action against you." An analysis of each step in the process demonstrates both Martin's commitment to this approach and the effects of political pressure from other commissioners and Congress on the outcome.

At the time of adoption of the *Wireline Broadband Order*, only four commissioners were seated, two Republicans (Martin and Kathleen Abernathy) and two Democrats (Michael Copps and Jonathan Adelstein). To accomplish his objective of leveling the playing field between DSL and cable, the chairman needed the support of at least one of the Democratic commissioners. A former Republican FCC official familiar with the negotiation explained it as follows:

> It was 2-2, so we had more limited ability to adopt something, we really needed a third vote. . . . From the Republicans' perspective, it was we don't want net neutrality legislation and we don't want net neutrality rules, so if we could buy off the Democrats with a Policy Statement that's not binding, that's a win. We did intend for it to be a Policy Statement that people actually abided by, which is why you needed the footnote on reasonable network management. But it was mostly – they were statements that Kevin strongly believed should govern the Internet, he just didn't want there to be rules or legislation. So the hope was that this would stave off the need for either of those.

Thus the *Policy Statement*'s mere existence was a result of political compromise, which explains why a chairman generally inclined towards deregulation would support its adoption at all. But it was also a statement of policy that the chairman generally believed in – he simply did not want that policy to unduly constrain operators by obtaining the status of a formal rule. Thus, while Chairman Martin claimed that the *Statement* was not enforceable and that "regulation is not, nor will be, required," he also admitted that the *Statement* "does reflect the core beliefs that each member of this Commission holds" (Martin 2005a). It expressed how he thought broadband should be offered, even if he preferred that the Commission not intervene to make it so.

At both times when the telcos sought approval for their mergers in November 2005 and December 2006, there were again only four commissioners voting. Chairman Martin clearly disagreed with the idea of including nondiscrimination conditions, as that would have placed ex ante constraints on the largest DSL providers that did not exist for the cable companies. The lightest touch regulatory approach possible – of describing principles to guide how the industry should behave and hoping that they comply – only remains light of touch until those principles become enshrined in binding orders. Commissioner Copps, joined by Commissioner Adelstein, used the leverage of the 2-2 commission to enshrine them despite Martin's objections. It was clear that Martin's position had more to do with regulatory process than with policy: just months before he wrote his dissenting statement about the AT&T/BellSouth merger conditions, he stated in testimony to Congress his belief that the FCC had authority under Title I of the Communications Act to take action if violations of the *Policy Statement* were to occur (Martin 2006).

By the time the allegations about Comcast's peer-to-peer management surfaced in 2007, there had been several heated net neutrality debates in Congress, with a number of bills introduced that would have codified far more detailed nondiscrimination rules than those that existed in the *Policy Statement*. Defending against what he viewed as unnecessary Congressional

intervention, Chairman Martin repeatedly emphasized to Congress and the public that the "Commission remains vigilant and stands ready to step in to protect consumers' access to content on the Internet" (Martin 2007, 7) (see also Martin (2007b; 2008a; 2008c)).

The fact that the *Policy Statement* provided no guidance as to what kinds of network management practices were to be considered "reasonable" created space for debate about whether Comcast's behavior violated the principles in the statement. Comcast's lack of transparency and shifting public statements about its practices (discussed further in Chapter 9) inflamed the public discussion. With Comcast potentially contravening in so public a manner the chairman's vision for how broadband should be offered and Congress threatening intervention that he did not want, Chairman Martin used an enforcement action (over the objections of the other two Republican commissioners) as a show of strength. A former FCC staffer explained the chairman's predicament:

> The FCC had principles in place and if Comcast could do what it did and the FCC, which nominally had these policies in place – whether they were rules or whatever, that's a legal game – if the FCC had these policies in place and yet was unable to do anything about it, that would have just shown that the emperor had no clothes, almost, right? So the FCC either – it sort of had a choice, it could either act like it had some power, or it could just reveal to the world that it had no power. And then what would have happened if it revealed that it had no power? [Congressman] Ed Markey would have pushed a bill through the House and [Senator] John Kerry and others would have picked it up in the Senate . . . .

While he may have declared the principles unenforceable and opposed the idea of making them binding in the absence of proof of specific infractions, issuing the order against Comcast provided an important deterrent to Congressional action while also proving that the regulatory threat embodied by the adoption of the *Policy Statement* had teeth. A former senior FCC official explained this preference for ex post enforcement over ex ante restrictions by analogy:

> There used to be highways – and I think there still are, out west – where there is no speed limit, but you can still be stopped for speeding. The speed limit is: you have to drive safely. And it's the difference between having a speed limit and having a principle of "you have to drive safely." And if you have a speed limit, you're on notice that you can't go faster than 55. If you have a principle that says you have to drive safely, you can get stopped and then you can be told, "what you're doing is not safe and if you continue to do it, then we're going to fine you." . . . I think to understand the commission's precedent, that's exactly what we did in *Carterfone* . . . we ultimately adopted rules, but the rules codified the principles that we had begun enforcing in the *Carterfone* decision. And that's exactly the same approach.

This was the embodiment of regulatory threat: putting the industry on notice, without too many specifics, and developing a record of adjudications over time so as to further refine what Commission policy should be. In a situation where, as the senior official explained, the FCC had not "fully vetted" what it meant for traffic management to be "reasonable," creating ex ante restrictions was seen as inappropriate: "it's much more difficult to write rules for the hard cases when you haven't had enough experience trying to figure it out." That there was highly relevant Commission precedent for principles-based adjudication was also important to the chairman – the *Comcast Order* refers to "our venerable *Carterfone* principles" (FCC 2008, 23) and uses *Carterfone* as an example in support of the claim that "the Commission has often relied on adjudications rather than rulemakings to enunciate and enforce new federal policy" (FCC 2008, 18).

Viewed through the lens of individual reputation and shaped by political pressure from his fellow commissioners and Congress, Martin's actions were fully consistent across time. They reflected his political skill and his personal desires to both refrain from ex ante intervention and bring the weight of the agency to bear ex post. They also had a marked effect on how traffic management in the US would evolve, as they set up a legal battle over the FCC's authority that Martin's successor, Julius Genachowski, had to navigate.

Julius Genachowski

The link between individual reputation and net neutrality policy outcomes is far more straightforward in the case of Julius Genachowski. Prior to being named as FCC chairman in 2009, Genachowski spent more than a decade as an executive and investor in the technology industry. This included a long stint at IAC/InterActiveCorp, whose web properties included Expedia, Match.com, Evite, and many more of the web's most popular sites, and advisory roles for Bandwidth.com, Truveo, and other start-ups engaged with VoIP and video (Carney 2006; Daver 2005). He was involved in the founding of multiple Internet-focused venture firms. In short, his professional experience was oriented towards businesses that harnessed the Internet and the web as platforms for novel services and applications.

He brought that orientation and his knowledge of the Internet industry with him when he joined Barack Obama's campaign team as a chief technology advisor ("Julius Genachowski" 2012). He urged the campaign to make aggressive use of social media and capitalized on his network of tech and venture contacts to raise hundreds of thousands of dollars for the campaign (Heilemann 2007). As he and his team developed Obama's tech policy platform, he made support for innovation a focal point. The platform was announced in late 2007, listing support for "the principle of network neutrality to preserve the benefits of open competition on the Internet" (Obama for America 2007, 2) as the first item on the future President's technology agenda. Long before he became FCC chairman, his desire for a policy of nondiscrimination on the Internet was clear. Once he became chairman in 2009, his commitment to reaching this goal took on significant reputational value; as one industry interviewee noted, "I think Genachowski wants to be viewed as more tech-friendly, so he's interested in things like . . . net neutrality."

It was no surprise, then, that the FCC issued a notice of proposed rulemaking (NPRM) concerning Internet openness shortly after Genachowski was appointed as chairman (FCC 2009). The proposed rules would have codified the four principles in the *Policy Statement*, added rules concerning transparency and nondiscrimination, and made each of the rules

subject to "reasonable network management." In its treatment of a number of thorny policy issues, including those related to traffic management, the NPRM provided an early example of another characteristic that would come to define Genachowski's reputation: his centrist approach to policy (Crawford 2013; Gustin 2013; McDowell 2013). Of the "narrowly and carefully tailored" standard for traffic management that had been established in the *Comcast Order*, the FCC wrote: "We believe that this standard is unnecessarily restrictive in the context of a rule that generally prohibits discrimination . . . . We seek comment on our proposal not to adopt the standard articulated in the Comcast Network Management Practices Order in this rulemaking" (FCC 2009, 51). Genachowski was showing that he was taking a more flexible substantive approach to net neutrality policy than his predecessor, even as the Commission sought to formally enshrine in rules what had previously existed only in the *Policy Statement*.

The complicated path that led from the NPRM to the adoption of the *Open Internet* rules continued to bolster the chairman's reputation as a tech-friendly centrist and revealed his skills of political negotiation. In April 2010, Comcast's legal challenge to the *Comcast Order* was upheld in court, calling into question the FCC's authority under Title I to issue broadband nondiscrimination rules (Comcast Corp. v. FCC 600 F.3d 642 (2010)). The Chairman and his staff responded by proposing a compromise "third way" legal framework to resolve the authority question (Genachowski 2010a; Schlick 2010), conducting a public inquiry into the viability of reclassifying broadband service under Title II (FCC 2010a), and engaging with members of Congress who mounted an effort to craft legislation to resolve the issue (Genachowski 2010b).

Due to political opposition, none of these efforts ultimately resulted in changes to the regulatory classification of broadband Internet service, but the chairman pushed forward with rules nonetheless. One industry interviewee explained that the seeds of this pursuit had been planted years prior: "once [Internet openness] became a platform in the President's campaign and he won the election, now there was this political driver to do something on net neutrality

. . . obviously doing something on net neutrality was a mandate." Another made a direct connection between the chairman's reputation and his resolve: "for Genachowski, with the way FCC chairmen are evaluated, if he doesn't do a rule he's a failure." He had committed himself to a policy that he felt would protect "Internet pioneers with little more than a good idea and a no-frills Internet connection" (Genachowski 2010c, 1); the emergence of legal hurdles did not deter him. A former FCC staffer explained this inevitability in the political context of the Commission, where, crucially, all five commissioners were seated and eligible to vote on the *Open Internet* rules:

> I think the chairman believed when he started and believed when he finished that having high-level rules was the right thing to do and he was going to bring it to order. I guess the only way it would not have happened is if there weren't three votes for any particular conception of it. . . . But I don't think – there was never any wavering . . . as to, should we have high-level rules of the road. He always thought we should and he was going to drive it through if he possibly could.

The rules that were adopted were perhaps the strongest indication of the chairman's tech-friendly yet centrist approach. They bolstered protections for innovators by creating enforceable rules and adding nondiscrimination and transparency provisions that the *Policy Statement* had lacked. As a result of tireless negotiations, their adoption was ultimately greeted without objection from nearly every major industry stakeholder in the broadband industry (save Verizon) and the tech sector (Albanesius 2010; Cicconi 2010; National Cable and Telecommunications Association 2010). The rules created a presumption of reasonableness for application-agnostic traffic management but refrained from adopting the "unnecessarily restrictive" (FCC 2010b, 49) standard from the *Comcast Order* and committed to further elaborating the reasonableness standard on a case-by-case basis. In short, the *Open Internet Order* arguably delivered on the Obama campaign promise of protecting "the Internet's traditional openness to innovation" (Obama for America 2007, 2) by carving out a middle ground approach with enough flexibility to accommodate most ISPs and enough teeth to assuage application providers' concerns. The rules precisely reflected the reputation of the chairman.

Although Genachowski charted a more regulatory course than his predecessor, both chairmen took full advantage of the flexibility that the FCC afforded them to act in the presence of uncertainty. Martin preferred to establish policy through principles-based adjudication because "[t]o establish principles, you're able to say, 'this is okay' and 'this is bad,' but 'we're not sure about the middle and we'll be able to continue to judge it as we get more and more facts,'" as the former senior official put it. Genachowski's approach likewise recognized that specifying very precisely which behaviors should be permitted and prohibited was not likely feasible, and that recognition together with his centrist leanings led to the creation of "a set of high-level rules of the road" (Genachowski 2010c, 136) that could be further refined through case-by-case adjudication. To pursue the policy outcomes that would define their legacies, the chairmen had to act without complete certainty about the effects of discrimination or the prohibition of its various forms. A former FCC staffer summarized this approach:

> [Y]ou're never going to resolve all ambiguities in a regulatory proceeding. . . . If we could come up with a perfect rule and that institution, the FCC, operated perfectly, that would definitely be the better place to be because everyone has certainty about what is and is not permitted. But that's a fool's errand. So, let's state some high-level principles and let's adjudicate cases on the facts in a case-by-case way.

The drive to take bold action despite uncertainty in the marketplace was notably absent from Ofcom's treatment of the net neutrality issue, as was the dominant effect of individual reputation. Those contrasts are the subject of the next section.

8.3.2 Ofcom

The comparison between the FCC and Ofcom is particularly salient because the role of reputation was quite central for both agencies' traffic management decisions; the difference with Ofcom was that its strong organizational reputation dominated its decision-making. As explained in this section, Ofcom's early work was so highly regarded by private and public sector stakeholders that it took on significant policymaking influence, including in the context of the EU framework review. As political pressure compelled the agency to become more

conservative, its roots as a competition regulator colored its approach to net neutrality, yielding a cautious, non-interventionist policy and focus on transparency that could reinforce the regulator's desire to be viewed as protective of consumers.

This section's analysis of Ofcom as an organization is not meant to suggest that the individual opinions and approaches of Ofcom officials were unimportant in the UK's net neutrality debate (in fact, the influence of key individuals is highlighted below). Rather, the claim here is that the organization's culture and image were highly determinative of the frame within which individual-level debates took place. They served to control the overall outcome, if not every nuance of Ofcom's traffic management decision-making.

Ofcom's Strong Organizational Reputation

During its formative years, Ofcom developed a strong organizational reputation and devoted significant attention to maintaining and promoting that reputation within the UK and elsewhere. It quickly came to be known for its effectiveness as a regulator characterized by technical expertise, rigorous analysis, evidence-based decision-making, and inside knowledge and understanding of the private sector (Lunt and Livingstone 2012). It would be difficult to find many stakeholders who would describe the FCC with the kinds of superlatives that interviewees – including representatives from regulated companies – used to describe Ofcom: "very rigorous in evidence-based policymaking," "a leader," "a heavyweight," "a very, very effective regulator," "a very successful institution," "a shining example," "the most competent authority," and "a leading light regulator." MP Peter Luff once remarked that Ofcom was "an organisation that has generally been held in very high regard by the industry concerned" (House of Commons 2007, Q57). Compared to regulators in other sectors and other countries, interviewees described Ofcom as "one of the leading regulators in the EU," "by far the best regulator, not just in telecoms, but in Europe," and "the best regulator in the world."

Several interviewees pointed to Ofcom's repeated top-ranking in the annual ECTA Regulatory Scorecard, which benchmarks the national regulators in Europe according to their effectiveness in spurring competition in telecommunications, as proof of Ofcom's effectiveness (European Competitive Telecommunications Association 2009). Ofcom's reputation clearly spanned international borders. One former Ofcom official recalled "flying every week sometimes to Brussels to speak at external conferences," while a former government official noted that "we had calls pretty much every week from regulators all over the world saying, 'We want to come to London, we want to hear about Ofcom,' or, 'Can you please send someone here to explain how it works . . . ?'" The agency commanded intense respect from its peers in other countries.

With this lofty status came a desire to continuously curate and preserve the organization's reputation. A phrase that interviewees used time and again when discussing Ofcom was "be seen" – whether Ofcom was "cautious about not being seen" to overstep its boundaries, that Ofcom "doesn't like to see itself" as interventionist, or that it needed to "be seen to be doing something" on consumer issues, the agency clearly had great concern not only for its work and the quality thereof, but for how it was being perceived by others. Indeed, one Ofcom official explained that a key function of Ofcom's international division was "protecting Ofcom's reputation overall and making sure that what Ofcom does and says is rightly understood and interpreted." In this way its corporate orientation shone through. Just as companies whose survival is ultimately in the hands of their customers invest significantly in their image and branding, so did Ofcom.

Ofcom built its reputation by being more than a technocratic implementer of powers delegated to it by the UK government and EU legislation. In its early years, it took bold, innovative steps, not the least of which was the Telecommunications Strategic Review that culminated in BT's Undertakings. The TSR was the first major overhaul of telecommunications regulation in decades – in Ofcom's own words, an endeavor to replace the existing "unsustainable" (Ofcom 2004e, 5) framework with a "new regulatory contract"

(Ofcom 2004e, 17) – and its relative success was the subject of envy within regulatory circles (Analysys Mason 2010). The TSR was just one reflection of Ofcom's commitment to holistic, strategic thinking. Because it was not bound by the need "to take each decision on its merits," as Ofcom's first head of strategy Kip Meek explained, the agency could take riskier, more decisive action than many other regulators (Crabtree 2004).

Impact of Reputation on Policy-Setting

Over time, Ofcom's depth of expertise, strategic focus, and outsized reputation created an unusual dynamic between the regulator and the government. Although Ofcom was statutorily designed to be the implementer of regulations to fulfill the government's public policy objectives, Ofcom's strategic and policy work reached much farther in reality. One former official who joined Ofcom upon its creation explained how this was implicitly blessed by government ministers:

> [In the] early days, you very much got the sense that ministers were, like, you know, "We created Ofcom, we're really proud of the fact that we've created Ofcom, now go away and do your stuff. Of course we will want to be kept in touch and occasionally kind of intervene just to tell you there's something that you're missing or there's a broader public policy objective at work here." But basically Ofcom was given a huge amount of latitude to make policy in a way that has never really been – that's not the way that European regulators have generally worked. It's not the way that Oftel worked. And it's not the way that the other European peer regulators in the sector worked, actually. And they always used to be amazed at the amount of stuff that we could get away with.

By the time the European telecommunications framework review began in 2007, Ofcom was taking the lead in representing the UK's policy voice during the negotiations in Brussels. One official explained that "Ofcom were in the driving seat," while a former government official from the Department of Business, Innovation & Skills (BIS) described all of the advantages that Ofcom had as a policy-setting body compared to BIS, the government department with authority over telecommunications:

> [W]e say they're the regulator and we're the policymaker, which is fair enough. But in some people's eyes that was sometimes blurred. And during the framework review, for example, Ofcom played a very prominent role. I mean, they are the regulator, they understand the issues probably better than policymakers do in various areas. They have more resources, they've always had more resources than I have. They have more money than we do, and I know that's not irrelevant. And so

> sometimes they would lobby in the [European] Parliament and they would say, "This is our view," and it would be interpreted as the UK view rather than the Ofcom view. So, you know, so there is a sort of policy dimension when your regulator, if you like, goes outside of the normal role of a regulator and sort of goes onto the public stage.

Ofcom had used its reputation and expertise to accrue policy responsibilities, which had important implications for the UK's position on net neutrality and traffic management during the framework review. As explained in Chapter 6, Ofcom's early positioning on the issue was staunchly pro-competitive and anti-interventionist. Its influence on the UK's position was palpable, as the former BIS official explained:

> [D]uring the framework review, we had a debate with Ofcom where they said that if blocking took place, that would be part of the normal competitive process. . . . We had discussions with Ofcom because it wasn't, at the time, it wasn't our position. We would have had to sort of come to an agreement on what our position [was]. They won. I mean I lost because ministers wouldn't back the position that I wanted to take as an official. Which is fine. But their argument at the time was that if blocking did occur, that was part of the normal process of delivering services. And so, you know, if one day you woke up and you found that you couldn't get Google, you would just go to another provider. So there wasn't any harm because it would be like taking another packet, going from one brand of cornflakes to another brand of cornflakes.

Because Ofcom spoke with such respect and authority, the agency's position that relying on competitive forces was the way to address issues of blocking (and, by extension, discrimination more generally) essentially became the UK government's position.

Reputational Transition

Ofcom's prominence within policy debates, both in telecommunications and in other areas, did not go unnoticed by those in industry and government, particularly in light of a long tradition of UK regulators acting with narrow remits as technocratic implementers of government policy (Ogus 1994). As one government interviewee remarked, "there's always been a bit of a question about is Ofcom sort of over-reaching." These concerns took on new significance leading up to the 2010 election. The Conservatives were solidifying their electoral prospects on a platform that included extensive cuts to government and regulatory agencies (also known as quasi-autonomous non-governmental organizations or "quangos").

In announcing his approach to quango reform, future Prime Minister David Cameron singled out Ofcom:

> OFCOM is the regulator for the communications industry, and it's clear that it has an important technical function. . . . But . . . OFCOM currently has many other responsibilities that are matters of public policy, in areas that should be part of a national debate . . . . These should not be determined by an unaccountable bureaucracy, but by minsters accountable to Parliament. So with a Conservative Government, OFCOM as we know it will cease to exist. Its remit will be restricted to its narrow technical and enforcement roles. It will no longer play a role in making policy. And the policy-making functions it has today will be transferred back fully to the Department for Culture, Media and Sport. (Cameron 2009)

With Cameron's intentions made clear, one former Ofcom official recalled a "huge change as the mood sort of darkened in Ofcom as the election approached." The Conservatives' electoral victory presented a significant challenge to Ofcom's status as an expert agency and its reputation as a strategic heavyweight. Combined with the government's austerity program, which for Ofcom meant instituting a 28% budget cut over four years beginning in 2010, the agency was faced with an urgent need to alter both its workload and its image to meet the expectations of the new government. Numerous interviewees noted how Ofcom CEO Ed Richards, being "politically astute" and "pragmatic," instituted a plan to adroitly re-shape both the agency's reputation and the allocation of its resources so as to appease the government without allowing Ofcom to be gutted entirely. Stepping back from any appearance of policy-setting was a key component of this plan, as explained by a former Ofcom official:

> [F]rom that very high, lofty position, it's a long way down. And certainly you feel threatened. . . . [I]t was definitely a shift to try to make us look more low key, more as implementers, rather than strategic. We were pretty much effectively told that the word "policy" was banned from being used in documents, okay? We won't talk about it, even if [it's] regulatory policy, because the Conservatives hated that. . . . Policy, for policymaking, they thought should reside in government, strategy should reside in government, we were there to be the technical implementers.

In some corners of Ofcom, the move to publicly rein in the agency's strategic work was welcome because it matched the staff's natural proclivities as evidence-based competition regulators. Some areas of policy that were arguably within their remit, including media plurality and the innovation and free expression issues bound up in the net neutrality debate,

did not lend themselves to straightforward quantification or traditional competition analysis. One industry interviewee observed that this type of work "is not based on evidence. It's based on kind of belief, core beliefs. And . . . [Ofcom is] just sort of not constitutionally organized, I think, to do those kinds of things." A former Ofcom official described how this sentiment was manifest internally, explaining that Ofcom "wants to find numbers and these are not numbers issues. These are to do with what kind of society we want to live in. . . . The natural instinct is to say, '. . . that kind of social policy, we shouldn't really be engineering that.'" If Ofcom could be said to have an organizational "culture" or "essence" (Barnard 1938; DiIulio 1994; Halperin 1974), it naturally skewed towards quantitative, technocratic, and narrowly focused. Ofcom Board Chair Colette Bowe and other senior Ofcom officials acknowledged the agency's difficulty in approaching issues that were not amenable to concrete definition and quantitative analysis (Lunt and Livingstone 2012).

Aversion to qualitative assessment and ambiguity had already colored Ofcom's approach to net neutrality before being reinforced by the agency's departure from the policymaking limelight. Numerous former Ofcom officials explained how, in the 2005-2009 time frame, Ofcom was undecided about whether discriminatory traffic management was problematic, and as a result it took a cautious, reactionary approach, only engaging when circumstances demanded it (as in the framework review) and advocating against intervention when it did engage. One interviewee described "strong internal divisions about whether or not it was an issue," resulting in internal deliberations of this sort: "This could be kind of important. We're not entirely sure. Is it really an issue right now? We're not entirely sure. Is anyone going to be upset? We're not entirely sure. We'll come back to it in six months. And then people would tend to come back to it in 18 months." Because some aspects of net neutrality did not fit neatly within competition analysis, Ofcom delayed getting deeply involved, by which time the organization was aiming to reduce its perceived policy presence so as to assuage the government's concerns.

Impact of Reputation on Net Neutrality Policy

The inclination to stay out of the limelight had important implications for Ofcom's approach when it did decide to engage publicly on net neutrality ("net neutrality, again, is just a symptom, it's a symptom of a shift within Ofcom" was how one former Ofcom official put it). Some stakeholders perceived that "Ofcom is now much more narrowly focused; that it has become risk averse; that it is not contributing to some of the big debates, which previously it would have played a major part in, for instance, things like net neutrality," as MP John Whittingdale described it (House of Commons 2011b, Q2). In 2010, the agency issued a discussion document about net neutrality and traffic management, outlining its initial views on the subject and seeking public comment. On the document's very first page, Ofcom made clear that it intended to approach the issue narrowly: "The debate ranges widely including questions such as whether citizens have a 'fundamental right' to a neutral internet, or whether 'net neutrality' promotes economic competitiveness and growth. These are important questions, but also ones primarily for governments and legislators." (Ofcom 2010c, 1)

The most fundamental questions about discriminatory traffic management squarely concern economic competitiveness and growth (and "industrial" policy, also mentioned in the document as a matter for government (Ofcom 2010c, 8)), since discrimination potentially affects the competitiveness and growth of the Internet applications sector, but Ofcom declared such topics outside of its scope. As one official involved in drafting the document explained, "different people could come to a different view of the weighting that they want to attribute to the innovation aspect . . . that's beyond our pay grade." A government interviewee concurred: "it's not for the regulator to make that judgment about what is good for the overall economy or the good of consumers. They can make judgment as to whether something is to their detriment, but not what is necessarily to their good."

To the extent that this reluctance to engage on the broader innovation issue resulted from Ofcom's trepidation about the perception that it had overstepped the bounds of its authority, its approach marks a significant contrast to that of the FCC. Julius Genachowski pursued his

goal of establishing net neutrality rules despite tremendous uncertainty about the FCC's authority to do so. Kevin Martin likewise pursued his own enforcement agenda without the greatest clarity about the agency's jurisdiction. At Ofcom, meanwhile, officials explained that they were "consciously very careful . . . not to tread on anybody's toes and make sure that it was very much linked to the transposition of the telecoms framework." The official involved in the drafting of the discussion document expressed that "what I thought was really important for Ofcom was not to get sidetracked into a debate where we really have no authority to just start making it up as we went along." The policy legacies that the individual FCC chairmen sought to leave behind trumped concerns about the scope of the regulator's remit and spurred them to take bold action to deter discriminatory conduct, whereas Ofcom's desire to re-brand itself as a technocratic implementer of government directives caused it to err on the side of caution, leaving the toughest questions about discriminatory traffic management unexplored.

Over the course of a year and a half of deliberations, Ofcom came to recognize the importance of some of the broader economic and innovation issues involved in net neutrality policy, discussing them in detail in its net neutrality position paper, *Ofcom's approach to net neutrality*, published in November 2011 (Ofcom 2011b). The regulator had clearly moderated its pro-competition rhetoric, claiming that "[w]here innovation is of particular importance, as here, a departure from the standard competition-based approach may . . . be justified" (Ofcom 2011b, 21) and signaling to the industry that "[o]ur stance as a regulator is that any blocking of alternative services by providers of internet access is highly undesirable, because of the potential effect on innovation" (Ofcom 2011b, 26). Some of this shift was attributable to the work of Steve Unger, the Ofcom executive in charge of the agency's net neutrality work. One industry interviewee recalled that after engaging with Unger "it was clear that he knew there was a problem" with allowing discrimination to get out of hand. After the document was published, Unger emphasized his appreciation of the innovation aspect at a Parliamentary hearing, noting that the net neutrality debate "is not primarily around competition" and that

there is "a story there around innovation and it goes beyond conventional competition laws" (House of Lords 2012, 21).

Despite the shift in rhetoric, however, Ofcom declined to use any regulatory powers, including the power to establish a minimum quality of service created by the transposition of the EU telecommunications package, to prevent or prohibit discrimination of any kind (including outright blocking). Instead, it focused on promoting transparency to ensure that consumers would receive all the information they would need to select broadband services. For a regulator with an aversion to ambiguity in an environment where it did not want to be perceived as making strategic decisions, transparency was a safe and relatively easy issue to pursue. A former official involved in the work noted the agency's reputational motivations in describing the press release that accompanied the release of the document:

> [The press release] led with consumer information. It was three quarters about consumer information, and that was mostly what was picked up in the press. Because you can't be wrong on consumer information. And it was a tiny bit about blocking and innovation at the bottom, which I think only The Register picked up in any real degree. . . . But I mean if you looked at everyone else that picked up the press release, they only focused on the first three quarters. Because you can't be wrong on that.

The focus on consumer information in the net neutrality context was part of a larger shift that Ofcom was making towards increasing its activity and presence in the area of consumer protection. The 2009 Ofcom Board Chair appointment of Colette Bowe, who had chaired Ofcom's consumer panel since 2003, combined with Ed Richards' desire to assuage the new government concerns about Ofcom's over-reach led to significant changes in the organization's structure and work. A new division was set up to focus specifically on consumer policy, Ofcom's annual plans devoted increasing attention to consumer protection (compare Ofcom (2008b) with (2010a)), and the agency increased its visibility on a wide variety of consumer protection issues, including the accuracy of advertised broadband speeds, bill shock, and many others. As one Ofcom official explained, "[w]e understand how markets work and therefore how industry works, but the most important thing that we need to understand and that we struggle much more to understand is what do consumers think and

how do consumers feel and what are their expectations and have they been harmed and can they switch . . . ? And that's where a lot of the energy . . . has gone." This was in some ways the latest evolution in the agency's quest to reconcile its statutory duties to further the interests of both consumers and citizens, its core competency as an economic regulator, and the political pressures it was facing (Lunt and Livingstone 2012).

This change was dramatic, as was its relationship to the agency's public image, as another formal Ofcom official explained:

> There's a very, very strong desire on the part of senior people at Ofcom now to be taking every opportunity to assert their pro-consumer credentials. And for people in the industry who have always seen the role of an economic regulator as being more of a, you know, kind of technocratic function, in many cases supporting the industry rather than, you know, rather than being focused purely on the consumer interests, it's been a bit of an unpleasant wake-up call to find that, you know, now, Ofcom is routinely sort of, you know, taking the opportunity to criticize individual firms for different courses of conduct and all this sort of thing. A lot of stuff that previously used to be done through more informal contact and in a more kind of light-touch way is now being done very publicly . . . and the obvious conclusion that people are drawing is that Ofcom has this, you know, wants to show that it's being tough and effective on behalf of the consumer.

Numerous interviewees stressed these reputational and publicity aspects – and the benefits to Ofcom – of the agency's shift towards consumer protection. One industry executive explained that Ed Richards was "more interested in doing things that will play well from a media point of view, which tends to be some of the consumer protection stuff," as opposed to technocratic analyses of telecommunications markets. Focusing on consumer protection allowed the agency to justify itself in public as a consumer champion and not be relegated to a pure technocratic function. As noted above, this dynamic was evident in Ofcom's work on net neutrality, where the tricky regulatory issues were discussed but not acted on, while the promotion of consumer interests received all the emphasis.

8.4 Conclusion

Reputational concerns clearly had profound effects on the decisions of both the FCC and Ofcom related to traffic management. In the case of the FCC, the agency's institutional structure endowed the chairmen with significant control over the agency's output, providing support for the theory that an agency with a commission structure endows those who lead it with the ability to act independently (Horn 1995; Majone 1994). This in turn put high reputational stakes on chairmen's decisions. Kevin Martin's endeavor to embody the combined conservative ideals of regulatory restraint and conscientious enforcement led the agency down a path of principles-based guidance followed by an adjudication that served as protection against further regulatory incursion by Congress. Julius Genachowski approached jurisdictional uncertainty and vitriolic debates with the tech-focused, centrist approach he had developed in the private sector. In reference to the *Comcast Order*, one industry interviewee noted that "had there been a different decision-maker with the same set of facts, I think it may have come out quite differently." That assessment would be equally true of many major decisions made by FCC chairmen (modulo political circumstances and less-than-full commissions) and it is a testament to the extent to which the FCC's work is shaped by the individual reputational concerns of the chairman.

The role of reputation within Ofcom stands in sharp contrast. Its organizational reputation grew so strong – on the basis of both the quality of its work and its attention to reputation management – that it was able to impress its competition-centric view on UK broadband policy writ large. But the broader economic issues bound up with questions about discriminatory traffic management did not fit neatly into its traditional competition framework, and as government pressure caused Ofcom to evolve its brand, the agency's inherent cultural aversion to qualitative assessment and ambiguity caused it to view regulatory intervention to safeguard nondiscrimination narrowly and skeptically. The agency turned the bulk of its attention to transparency as part of a larger internal push to develop its image as a consumer champion.

As discussed above, Ofcom is widely respected among many of its constituencies for the rigor of its analysis and depth of expertise, whereas the FCC as an organization is not highly respected. However, for policy issues like net neutrality that require taking potentially controversial positions and that cannot be fully accommodated by competition analysis, Ofcom's institutional structure presents significant barriers when compared to that of the FCC. While allowing important policy decisions to be subject to the whim of the chairman (at least in part) has the disadvantage of potentially creating incoherence and arbitrariness in the long term (as theorized by Katzmann (1980)), the fact that the FCC chairmen had such broader leeway to act was a key factor in establishing a nationwide nondiscrimination policy in the US. Kevin Martin declared a policy unenforceable and then enforced it. Julius Genachowski had rules enacted with near-uniform industry support despite serious doubts about the Commission's authority to do so. Both of these steps and the many others in between created the culture of regulatory threat that deterred many large ISPs from discriminating for many years. Ofcom, presented with evidence of widespread discrimination but unable or unwilling to take a broad view of that evidence in light of its reputational need to scale back its involvement in policy matters, conversely created a regulatory culture of permissiveness.

Each regulator's particular reputational focus and interpretation of its own remit was in part a reflection of its structural foundations. The reputational pressures and perceived remits themselves, however, were the key determinants of their decision-making, notwithstanding the presence or absence of discrimination or competition in either market.