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LEGITIMATE FROM THE INSIDE OUT: A REVIEW OF HOW AGENCIES ACT WHEN JUDGES ARE NOT WATCHING

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“Be more concerned with your character than your reputation, because your character is what you really are, while your reputation is merely what others think you are...the true test of a man’s character is what he does when no one is watching.” John Wooden.

INTRODUCTION

It is easy to do the right thing when people are watching. When you know you are being judged or scrutinized, you tend to be on your best behavior. People slow down when they see a police car, they sit up straighter if the teacher is watching, and they follow the rules when the referee is on the field. But “the true test of a man’s character is what he does when no one is watching.”¹ The same could be said for administrative agencies. This “fourth branch of the government”² makes, applies, and enforces rules that dictate how we live our life, from the food

¹ JOHN WOODEN ET AL., *THEY CALL ME COACH*, McGraw-Hill (2004).

² See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (espousing one of the first views of the administrative state as a “veritable fourth branch of the government”). See generally Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 700-02 (2006); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 950 (2000).

we eat,³ to the water we drink and the air we breathe.⁴ Some have called this type of centralized power undemocratic,⁵ and it understandably raises questions about the legitimacy of the administrative state.⁶ How can agencies' actions be legitimate when they often are judge, jury, and executioner? Such circumstances highlight the importance of "character" within an agency: how faithfully it adheres to the rules guiding decision making, how open it is with people impacted by those decisions, and how frequently it changes course to address concerns from those impacted by agency decisions.

The good news is that there are usually democratic checks on agency decision-making. In particular, the Administrative Procedure Act (APA) provides for judicial review of many agency decisions.⁷

³ The U.S. Food & Drug Administration (FDA) regulates the safety of substances added to food and how most food is processed, packaged, and labeled. *See* Food Ingredients & Packaging, FDA, <https://www.fda.gov/food/food-ingredients-packaging> (last visited Sept. 12, 2019).

⁴ The U.S. Environmental Protection Agency's (EPA) mission is to protect human health and the environment, including drinking water and air quality. *See* Our Mission and What We Do, EPA, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Sep. 12, 2019). *See also* About the Office of Water, EPA, <https://www.epa.gov/aboutepa/about-office-water> (last visited Sep. 12, 2019) (discussing statutes designed to protect drinking water); Overview of the Clean Air Act and Air Pollution, EPA, <https://www.epa.gov/clean-air-act-overview> (last visited Sept. 12, 2019) (providing overview of the Clean Air Act and air pollution).

⁵ *See* David Arkush, *Democracy and Administrative Legitimacy*, WAKE FOREST L. REV. (2012).

⁶ *Id.*

⁷ *See generally* 5 U.S.C. § 500 *et seq.* (2019); *see* 5 U.S.C. §§ 701–706 (establishing judicial review for a large subset of agency decisions).

Therefore, people affected by an agency's decisions and the judiciary can "watch" what an agency is doing and can weigh in on or challenge that decision.⁸ This only seems fair in our democratic society where the people serve as a type of grand jury over government action.⁹ Administrative actions subject to judicial review have been heavily studied, mainly through academic analysis of case law focusing on the strengths and weaknesses of judicial review.¹⁰ However, not all agency decisions are subject to judicial review. Judicial review may be precluded by

⁸ See 5 U.S.C. § 553 (providing for public notice and comment for rulemaking); 5 U.S.C. §§ 701–706 (establishing judicial review for a large subset of agency decisions).

⁹ See *United States v. Williams*, 504 U.S. 36, 47 (1992) (discussing how a grand jury "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.").

¹⁰ See, e.g., Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 45 DUKE L.J. 984, 1011-12 (1990); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098-100 (2008). See also Richard J. Pierce, Jr., *The Battle to Protect the American Public Will Become Even More Difficult*, 79 GEO. WASH. L. REV. 845, 851 (2010) (reviewing RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTEREST, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT* (2010) (noting that "[i]t is easy to conclude that judicial review has become extreme when a court concludes that a 1600-page explanation of an agency's action is not sufficient to comply with the statutory requirement of a 'concise general statement of [its] basis and purpose.'").

statute,¹¹ or there may be no law to apply because the act is within the agency's discretion.¹² In these cases, the legitimacy of agency decision-making is even more suspect, as there is no one watching and no external check over the agency's action.

There is significantly less scholarly discussion on these types of agency actions as there is no case law on these agency decisions to analyze. Some academics have hypothesized that agencies can create an alternative type of legitimacy: an "inside-out legitimacy" even when there is no judicial review of their actions.¹³ Specifically, Professors Emily Hammond and David Markell developed several metrics for measuring inside-out legitimacy and applied those metrics to the Environmental Protection Agency's (EPA) process for considering petitions to withdraw state authority.¹⁴ The metrics included the frequency with which the public invokes the agency's process, the agency's responsiveness and reasoning, and the substantive outcomes of the agency's

¹¹ 5 U.S.C. § 701(a)(1) (no judicial review where "statutes preclude judicial review"); see *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984) (holding statute's structure evidenced Congressional intent to preclude review of milk market orders in suits brought by consumer).

¹² 5 U.S.C. § 701(a)(2) (no judicial review where "agency action is committed to agency discretion by law"). See, e.g., *Heckler v. Cheney*, 470 U.S. 821, 837-38 (1985).

¹³ Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313 (2013).

¹⁴ *Id.*

process.¹⁵ In applying the inside-out legitimacy metrics to the EPA's process, they found that the EPA "engages in numerous behaviors indicative of intrinsic legitimacy."¹⁶

This article seeks to further this work by applying these metrics to several other agencies' practices related to unreviewable agency actions. Part 1 of this article will briefly describe the role of judicial review in legitimizing agency actions. Part 2 will describe Professors Hammond and Markell's metrics for inside-out legitimacy (Inside-Out Legitimacy Metrics). Part 3 of this article will provide a case study of two other agencies' processes for unreviewable actions and applies the Inside-Out Legitimacy Metrics to those processes. Part 4 of this article discusses how these other agencies fare under the metrics developed to assess inside out legitimacy and provides trends and recommendations for agencies and petitioners. This article concludes that agencies with unreviewable processes appear to be acting in an internally legitimate manner, suggesting that they are acting consistent with their authority, even when the judicial branch is not watching.

I. Legitimizing Agency Actions through Judicial Review

The success of democracy in the United States depends on the health of the components that make up its structure. Our democracy sits atop a three-legged stool: the judicial, executive and legislative branches. In order for our democracy to remain steady, however, those branches must operate under a system of checks and balances, with each leg steadying the other two.

But each branch must also be solid and reliable from within to provide that steadying force; each branch needs a support system, either

¹⁵ *Id.* at 327-30.

¹⁶ *Id.* at 313.

an internal or external one, to ensure its continued viability. For example, the legislative branch's bicameral structure provides a balancing force, and the executive branch relies on the Cabinet and independent agencies to oversee and execute a significant amount of its work. At first glance, the judicial branch does not appear to have this internal balance. However, part of the support system comes from administrative agencies. While technically under the executive branch, the administrative law practiced within federal agencies actually affords the judicial branch — and the democratic system as a whole — a distinct benefit, namely a devoted agency with specialized expertise. But perhaps one of the biggest benefits of agency administrative law is its ability to offer some workload relief to the judicial system. By shouldering the heavy weight of the numerous and varied actions raised in the administrative forum, administrative law likely helps to alleviate some of the weight of an overburdened judicial system.

But ultimately, the relationship between the judicial branch and administrative agencies is mutually beneficial. In order to continue to provide relief to the judicial branch, aggrieved parties must have some degree of assurance of the legitimacy of the administrative forum. One way to provide that assurance is, symbiotically, through review by the judicial branch.¹⁷

¹⁷ *E.g.*, *Ctr. for Auto Safety v. Dole*, 828 F.2d 799, 813 (D.C. Cir. 1987) (“To the extent that judicial review helps to assure that factual support exists for [National Highway Transportation Safety Administration] decisions denying enforcement petitions, it helps to reduce the threat of traffic accidents, and aids, not hinders, the basic congressional purpose of the statute.”).

The U.S. court system has repeatedly found a strong presumption in favor of judicial review of agency actions.¹⁸ Over the years, however, that presumption has been repeatedly challenged. In 1967, the Supreme Court in *Abbott Labs. v. Gardner* stated that the APA “embodies the basic presumption of judicial review to one ‘suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.’”¹⁹ Additionally, the *Abbott Labs* Court found that the APA granted subject matter jurisdiction for judicial review.²⁰ While the general principle supporting judicial review of agency action espoused in *Abbott* has withstood the test of time, the more specific holding that the APA conferred subject matter jurisdiction was later abandoned in *Califano v. Sanders*.²¹ But rather than operating as a reversal of the principle that the APA contains a presumption of judicial review, *Califano*’s holding was the result of a change in law, which provided jurisdiction to federal courts to review agency action.²² These early cases, and legislative action, demonstrated a strong preference for a presumption of judicial review of agency action.

A presumption, however, is just that. And the scope of any presumption is not insulated from circumscription, as illustrated in a string

¹⁸ *Mach Mining, L.L.C. v. E.E.O.C.*, 135 S. Ct. 1645, 1650-51 (2015); *St. Francis Med. Ctr. v. Shalala*, 32 F.3d 805 (3rd Cir. 1994); *Council for Urological Interests v. Sebelius*, 668 F.3d 704, 708-709 (D.C. Cir. 2011); *BNSF Ry. Co. v. E.E.O.C.*, 385 F. Supp. 3d 512, 522 (N.D. Tex. 2018).

¹⁹ *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967).

²⁰ *Id.* at 141.

²¹ 430 U.S. 99 (1977).

²² *Id.* at 105.

of Social Security cases dealing with federal question jurisdiction. The Supreme Court issued, from 1975 to 1986, four cases wrestling with the text concerning judicial review of agency action in various sections of both Chapter 85 of Title 28 (District Courts; Jurisdiction) and Chapter 7 of Title 42 (Social Security) of the U.S. Code.²³ These four cases struggled with similar arguments—namely, the limits of federal question jurisdiction for causes of action under section 405 of the Social Security Act—but came out in different places.

The commonality amongst the cases is thematic: they all feed into a larger discussion about the need to demonstrate a clear congressional intent in order to curtail or eliminate judicial review in light of the strong desire to uphold the right to judicial review, which claimants sought through constitutional claims under 28 U.S.C. § 1331. In *Weinberger v. Salfi* and *Heckler v. Ringer*,²⁴ the Supreme Court held that the jurisdiction for judicial review of the causes of action brought in both cases was limited to those provisions specifically found in the Social Security Act (e.g., 42 U.S.C. §§ 405(g),(h)). As a consequence, claimants could not also rely on 28 U.S.C. § 1331 (“Federal question”) to obtain judicial review, which could be seen as a winnowing of the broader doctrine favoring judicial review.²⁵ In the alternative, in *United States v. Erika, Inc.*²⁶ and *Bowen v. Michigan Academy of Family*

²³ *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Heckler v. Ringer*, 466 U.S. 602 (1984); *United States v. Erika, Inc.*, 456 U.S. 201 (1982); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986).

²⁴ *Weinberger*, 422 U.S. 749 (1975); *Heckler*, 466 U.S. 602 (1984).

²⁵ *Weinberger*, 422 U.S. 749, 761 (1975); *Heckler*, 466 U.S. 602, 616 (1984).

²⁶ 456 U.S. 201 (1982).

Physicians,²⁷ the Supreme Court found, in part, that the bar for total preclusion of judicial review for Social Security claims had not been met.²⁸ In *Michigan Academy*, the Court traced the foundation of the presumption of judicial review to *Marbury v. Madison*,²⁹ in which Chief Justice Marshall opined, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws. . . .”³⁰ The *Michigan Academy* Court then described the seriousness with which an argument precluding all judicial review would be met, and noted that both Houses of Congress supported a strong presumption of judicial review when they developed the APA by engaging in a thorough analysis of “the place of administrative agencies in a regime of separate and divided powers.”³¹ In its deliberations, the Senate Committee on the Judiciary noted:

Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, *for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.*³²

The final sentence in this quote underscores the core issue—the credibility of our democratic institutions (here, administrative agencies)

²⁷ 476 U.S. 667 (1986).

²⁸ *Erika*, 456 U.S. at 208-10; *Mich. Academy*, 476 U.S. at 674.

²⁹ 5 U.S. 137 (1803).

³⁰ *Mich. Academy*, 476 U.S. at 670 (quoting *Marbury*, 5 U.S. at 163).

³¹ *Id.* at 670-71.

³² S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945) (emphasis added).

requires a check and balance to guard against the tyranny of limitless authority and arbitrary decision-making. *Michigan Academy* and its robust defense of the presumption in favor of judicial review, still stands for the principle that judicial review lends much-needed legitimacy to agency action.³³ But all of the aforementioned cases serve to highlight the consequential role of judicial review in our democracy and also illustrate the need to ensure that our institutions — including administrative agencies — maintain continued credibility.

II. Hammond and Markell's Inside-Out Legitimacy Metrics

Given the consequential role judicial review plays in ensuring that agency decisions are reliable, it is notable that a number of agency decisions are not reviewable by courts.³⁴ This would seem to undermine the checks and balances integral to our democratic structure and function. However, despite the lack of judicial review, Professors Emily Hammond and David Markell theorized in their article, “Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out,” that unreviewed agency processes may carry their own internal markers of legitimacy.³⁵ To advance the theory and empirical analysis of inside-out legitimacy, Hammond and Markell developed metrics for evaluating administrative processes that are typically unreviewable by the courts.³⁶

³³ Shortly after the *Michigan Academy* opinion was issued, Congress amended the Medicare Act to provide for an administrative hearing and judicial review for Part B claims for benefits—which were at issue in *Michigan Academy*—as was available for claims under § 405(g). See Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341(a)(1), 100 Stat. 1874, 2037-38 (1986) (codified at 42 U.S.C. § 1395ff).

³⁴ Hammond & Markell, *supra* note 13, at 314-15.

³⁵ *Id.* at 315-16.

³⁶ *Id.* at 316-17.

These Inside-Out Legitimacy Metrics include: how an administrative procedure is used;³⁷ the agency's responsiveness and reason-giving; and the substantive outcomes reached.³⁸ As discussed in more detail below, these metrics were developed based on the insights of judicial review and can be applied to unreviewable agency actions to evaluate their legitimacy from the inside out.³⁹

A. How the Procedure is Used

The first metric for measuring inside-out legitimacy is how citizens use the agency procedure or process.⁴⁰ This metric relates to the democratic principles of voice: does a citizen feel heard?⁴¹ As explained below, Hammond and Markell reason that insights can be gained into the perceived legitimacy of an agency's procedure based on both how often and how citizens use the procedure.⁴²

1. Is the Agency Procedure Used?

Hammond and Markell assert that "measuring the extent to which a procedure is used permits a backstop assessment of legitimacy."⁴³ In their view, a process arguably cannot be called legitimate

³⁷ Both process and procedure are used in describing this metric. *See id.* at 317 (using process); *id.* at 328 (using procedure).

³⁸ *Id.* at 317.

³⁹ *Id.*

⁴⁰ Hammond & Markell, *supra* note 13, at 328.

⁴¹ *Id.* (Hammond and Markell relate this metric to the principles of participation, deliberation, and trust).

⁴² *Id.*

⁴³ *Id.*

if citizens do not use it.⁴⁴ Thus, frequent and sustained use of an agency's procedure is a sign of internal legitimacy.⁴⁵ In contrast, infrequent or declining use of an agency's procedure suggests that citizens do not view it as legitimate in that the costs of using it outweigh the benefits.⁴⁶ This makes intuitive sense and is consistent with the democratic principle of voice: individuals are more likely to use a process in which they feel heard. While this concept of use is noted as a "necessary predicate to applying additional legitimacy metrics,"⁴⁷ Hammond and Markell recognize that even a single or limited use of a process may have enormous value in terms of environmental protection, government enforcement policies and practices, or citizen confidence in governance efforts and in compliance with environmental requirements more generally.⁴⁸

2. How Do Citizens Use the Agency Procedure?

In addition to how often a procedure is used, Hammond and Markell assert that how a citizen uses the procedure provides insights into its legitimacy.⁴⁹ In particular, Hammond and Markell focus on the substantive concerns raised and the "relative sophistication with which they

⁴⁴ *Id.*

⁴⁵ Hammond & Markell, *supra* note 13, at 328 (noting that sustained citizen use of a process over time suggests a sign of vitality).

⁴⁶ *Id.*

⁴⁷ *Id.* at 328.

⁴⁸ *Id.* at n.94 (citing John H. Knox & David L. Markell, *Evaluating Citizen Procedures: Lessons from the Analysis of the NAFTA Environmental Commission*, 47 TEX. INT'L L.J. 505, 515 at n.52 (2012)).

⁴⁹ *Id.* at 329 (stating that understanding how a procedure is used is a necessary predicate to understanding the legitimacy of how the agency responds).

are raised.”⁵⁰ They argue that both frame the dialogue between the citizen and the agency.⁵¹ Thus, if a citizen raised safety concerns backed with scientific data, presumably a legitimate agency response would be to address those concerns in a sophisticated and informed manner, similar to how an agency has to respond to significant comments raised in the rulemaking process;⁵² an illegitimate agency response would be to not respond to significant comments,⁵³ or to respond without a sufficient basis.

B. Treatment—Responsiveness and Reason-Giving

The second metric in measuring inside-out legitimacy is the agency’s treatment of the procedure. Hammond and Markell break the agency’s treatment of the procedure down into the agency’s responsiveness and the agency’s reason-giving.⁵⁴ These substantially overlapping concepts relate to the requirement for agencies to engage in reasonable analyses and, when subject to judicial review, serve as a check on agencies’ power and preserve agencies’ constitutional legitimacy.⁵⁵ As discussed below, Hammond and Markell argue that responsiveness and reason-giving are significant indicators of internal legitimacy when judicial review is absent.

⁵⁰ Hammond & Markell, *supra* note 13, at 328.

⁵¹ *Id.*

⁵² *Id.* at 328-29.

⁵³ See *Reyblatt v. NRC*, 105 F.3d 715, 722 (D.C. Cir. 1997) (“An agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems.”).

⁵⁴ Hammond & Markell, *supra* note 13, at 329.

⁵⁵ *Id.* at 321 (internal citations omitted).

1. Responsiveness: How Does the Agency Treat the Procedure?

Hammond and Markell refer to responsiveness as “the extent to which the agency acknowledges and seeks resolutions of the concerns that were raised.”⁵⁶ Similar to the first metric’s concept of how the agency responds to the substance raised by a citizen, responsiveness is “analogous to the judicially created requirement that agencies respond to significant points raised in the rulemaking context.”⁵⁷ Thus, the more responsive an agency is to the significant points raised, the more agencies “build legitimacy by reinforcing participation, deliberation, voice, and trust.”⁵⁸

2. Reason-Giving: What is the Agency’s Rationale for its Decision?

Not surprisingly, the reason-giving aspect of the second metric plays a significant role in furthering legitimacy because it mirrors the concept of an agency having a reasoned basis for its action in anticipation of judicial review.⁵⁹ Hammond and Markell explain that “[a]gencies expecting judicial review will provide rationales for their decisions that reveal deliberations, further transparency, illustrate neutrality, evidence respect for the parties, and demonstrate compliance with statutory

⁵⁶ *Id.* at 329.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Hammond & Markell, *supra* note 13, at 329 (noting that the reason-giving requirement plays a significant role in furthering legitimacy because much of its force comes from its impact on agency behavior *ex ante*).

mandates.”⁶⁰ Thus, if agencies provide a reasoned explanation for its action even when there is no judicial review, it is an indicator of inside-out legitimacy.⁶¹ This concept brings to mind the saying that the true test of a person’s character is what he or she does when no one is watching.⁶² And the good news appears to be, at least with respect to the EPA⁶³ and the agencies described below in Part III, that agencies are explaining why they view their outcomes as reasonable regardless of whether the courts are watching or not.⁶⁴

C. Substantive Outcomes

The final metric for measuring inside-out legitimacy is the substantive outcome of an agency’s process. Hammond and Markell apply this metric to assess the process’s fidelity to the agency’s enabling

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² WOODEN ET AL., *supra* note 1.

⁶³ Hammond & Markell, *supra* note 13, at 348 (noting that as part of its withdrawal of state authority petition process, the “EPA typically was responsive and engaged in reason-giving even though there was no statutory or judiciary requirement that it do so and even though the likelihood of judicial review was remote”).

⁶⁴ While Hammond and Markell considered use of data and legal standards in determining whether agency rationale was in fact responsive, *see id.*, this article does not use these metrics because many of the processes studied in this article govern informal requests for action, which may warrant less structured responses from the agency, *e.g.* 47 C.F.R. § 1.41 (1998); 10 C.F.R. § 2.206 (2015).

statute and the practical effect of the outcome as an indicator of the internal legitimacy of the procedure.⁶⁵

1. Fidelity to Statute

As discussed in Part I, agencies' powers are delineated within a statute, and agencies should act consistent with the powers and procedures in that statute.⁶⁶ As Hammond and Markell explain, "ensuring fidelity to statute is one of the key functions of judicial review."⁶⁷ It is through judicial review that courts ensure that agencies "act only within the confines of their statutory mandates."⁶⁸ Therefore, it makes sense to assess how closely an agency follows its statute in the absence of judicial review as a marker for legitimate action. Under Hammond and Markell's theory of this metric, "[i]f measurable changes are made in statutorily mandated areas of concern, [one] can infer that using the process helped legitimize agency behavior in a substantive way."⁶⁹ Conversely, then, if the outcome of the agency's process did not make changes needed to meet statutorily mandated areas of concern, the public would be rightfully concerned that the process was illegitimate.

2. Internal Legitimacy of the Procedure

⁶⁵ *Id.* at 329-30.

⁶⁶ *See infra* Part I.

⁶⁷ *Id.* at 326.

⁶⁸ *Id.* at 321 (citing 5 U.S.C.A. § 706(2)(C) (Westlaw through Pub. L. No. 116-91)).

⁶⁹ *Id.* at 329.

Finally, Hammond and Markell assert that substantive outcomes indicate whether the procedure itself is internally legitimate.⁷⁰ They argue that “if change seems unobtainable, a process may be viewed as arbitrary or useless, undermining its overall legitimacy.”⁷¹ This makes sense and ties back to the extent of use metric as presumably a process that appears to garner the requested results will be used more frequently. In contrast, a process that does not garner the requested results will likely not be used in the long-term. Thus, “much like [the] metric for extent of use, substantive outcomes provide a backstop check on legitimacy.”⁷²

III. Agency Processes for Unreviewable Actions

Hammond and Markell’s case study looked only at the EPA’s Petition to Withdraw process. This article seeks to further their analysis by applying the Inside-Out Legitimacy Metrics to other agency’s processes for unreviewable action. In particular, although a few agencies have regulations that govern public requests for agency action,⁷³ only two agencies appear to have systematically published agency decisions responding to those requests. Also, to ensure the results are indicative of current agency practices, this article only considers the last ten years of decisions. Therefore, the below discussion and analysis studies processes used by the Federal Communications Commission (FCC) and the Nuclear Regulatory Commission (NRC) based on publicly available decisions from the years 2008 through 2018. First, a brief description of

⁷⁰ Hammond & Markell, *supra* note 13, at 329.

⁷¹ *Id.* at 330.

⁷² *Id.* at 329.

⁷³ 16 C.F.R. § 2.2 (2020), 29 C.F.R. § 101.4 (2020), 49 C.F.R. § 100.24, and 17 C.F.R. § 202.5 (2020).

the agency's mission and unreviewable process is provided. Next, the Inside-Out Legitimacy Metrics are applied and analyzed. Then, Part IV will analyze these results, discuss trends, and provide recommendations to agencies and petitioners.

A. Federal Communications Commission

The Federal Communications Commission (FCC) is an independent government agency established by the Communications Act of 1934.⁷⁴ The FCC regulates interstate and international communications by radio, television, wire, satellite, and cable. As discussed in detail below, the FCC provides members of the public, including regulated entities such as telecommunication companies and exchange carriers, formal and informal opportunities to initiate an action against a common carrier subject to FCC regulation.⁷⁵ Both of these processes occur in the realm of the FCC's administrative forum, but nevertheless have indicators of being legitimate under the Inside-Out Legitimacy Metrics.

1. FCC's Formal Request for Action Process

FCC's formal complaint process provides a valid, accessible, and responsive administrative system. For example, FCC regulations require parties to engage in a dialogue before a complaint is filed and also allow the Commission to order informal meetings between parties

⁷⁴ 47 U.S.C. § 609 *et seq.* (1934).

⁷⁵ 47 U.S.C. § 208 (2019) allows, “[a]ny person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act . . . may apply to said Commission by petition . . . whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier.” *See also* 47 C.F.R. §§ 1.716 – 1.740 (2020).

during litigation.⁷⁶ These types of procedures contribute to the perception that an agency offers the public a fair and rational venue for filing a complaint.

As discussed above, the first inside-out legitimacy metric is “usage.”⁷⁷ This metric presumes that legitimacy increases if the tools established by an agency for seeking and securing relief are being used by parties consistently over time. A review of FCC case law over the last ten years reveals that the FCC has disposed of ninety-two actions that cite to the introductory regulation to the formal complaint section, 47 C.F.R. 1.720, “[p]urpose,” as part of their basis (see Figure 1).⁷⁸

⁷⁶ See 47 C.F.R. §§ 1.735(b), 1.722(g) (2019).

⁷⁷ Hammond & Markell, *supra* note 13, at 342.

⁷⁸ Actions include a variety of orders as well as letter rulings.

Figure 1⁷⁹

Year	Decisions
2018	15
2017	8
2016	10
2015	19
2014	4
2013	12
2012	6
2011	3
2010	4
2009	11

While some years saw fewer requests, such as 2011, many years had a fair amount of cases filed, with 2018 being the second busiest

⁷⁹ This list may include subsequent, related actions in some cases.

year.⁸⁰ This trend suggests that the FCC enjoys a steady—if not growing—reputation for validity under the usage metric.⁸¹

Both individual members of the public as well as corporate entities have filed formal complaints in the last ten years, suggesting a wide range of the public believes the FCC's administrative processes is valid. But quantity of litigation may not be the only sign that an agency's administrative processes are viewed as valid. Another possible sign of perceived legitimacy is the amount of resources (e.g., time, money, etc.) a complainant is willing to invest into an action. At the FCC, complainants have the option to transition an informal complaint to a formal complaint.⁸² A sustained investment, either through transitioning an informal complaint to a formal complaint or simply by persevering through an extended litigation, suggests at least the perception that the process carries the possibility of achieving the desired result.

One case illustrating this point involved the famed do-not-call rule.⁸³ Consumer.net and Mr. Russ Smith, an individual complainant, filed suit against Verizon (as well as several Verizon subsidiaries) alleging, amongst other things, that Verizon violated rules relating to

⁸⁰ *Id.*

⁸¹ *Cf.* Hammond & Markell, *supra* note 13, at 347, 364.

⁸² *See* 47 C.F.R. §§ 1.718, 1.719(d); *see, e.g.*, Saturn Telecomm. Servs., Inc. v. Bell South Telecomms., Inc., d/b/a AT&T, Fla., 28 FCC Rcd 4335 (2013); APCC Servs., Inc. v. Intelco Commc'ns, Inc., 28 FCC Rcd 1911 (2013); AT&T Servs. Inc., & AT&T Corp., v. Great Lakes Comnet, Inc., & Westphalia Tel. Co., 30 FCC Rcd 2586 (2015) (describing the arrangement in which the traffic is routed from wireless callers around the country to LEC-MI).

⁸³ *See* <https://www.fcc.gov/general/do-not-call>.

telephone solicitations.⁸⁴ An informal complaint was originally filed in 2004 and was transitioned to a formal complaint in 2005.⁸⁵ The Commission found against the complainants on almost all of the counts, but they upheld the claim that Verizon had failed to “promptly implement Smith’s September 2003 request to place his telephone number on its company-specific do-not-call-list.”⁸⁶ The total length of the suit, from inception to disposition, was approximately five years and six months.⁸⁷ While perhaps not an unreasonable length of time for a typical lawsuit, and likely not a deterrence to a corporate entity pursuing relief, five and a half years requires some amount of patience from an individual consumer/litigant. Overall the amount of complaints filed over the last ten years, and the determination with which some complainants seek resolution, suggests a judgment made by the public that the FCC will treat complaints seriously—that there is legitimacy in the FCC’s administrative processes.

The second inside-out legitimacy metric is an agency’s responsiveness and reasoned decision-making; how an agency disposes of complaints may dictate whether the public will perceive the administrative process as valid. In applying this metric to the FCC’s formal process under 47 C.F.R. § 1.720, it appears that the FCC process demonstrates high internal legitimacy. In a review of the cases in the last ten

⁸⁴ *Consumer.net, L.L.C. v. Verizon Communications, Inc.*, 25 FCC Rcd. 2737 (2010).

⁸⁵ *Id.* at 2738 n.4.

⁸⁶ *Id.* at 2745.

⁸⁷ In that time period, the parties engaged in discovery, such as serving two sets of interrogatories, and filed various motions.

years (excluding letter rulings and dismissal orders), the FCC typically either briefly described or at least acknowledged each claim raised.⁸⁸

The FCC is also responsive and provides some rationale for the disposition of each issue raised by a complainant approximately most of the time.⁸⁹ An example of the FCC's responsive approach can be found in a 2014 case instituted by an individual, Ms. Nina Shahin, against Verizon Delaware, LLC and Verizon Online, LLC (collectively, Verizon).⁹⁰ In that case, Ms. Shahin filed a formal complaint alleging that Verizon

⁸⁸ See *supra* note 82; see e.g., *In the Matter of AT&T Corp., v. Iowa Network Services, Inc. D/B/A Aureon Network Services*, 33 FCC Rcd. 11,855, (Nov. 28, 2018); *In the Matter of Verizon Virginia, L.L.C. and Verizon South, Inc. v. Virginia Electric and Power Company D/B/A Dominion Virginia Power*, 32 FCC Rcd. 3750 (May 1, 2017); *In the Matter of NTCH, Inc. v. Cellco Partnership D/B/A Verizon Wireless*, 31 FCC Rcd. 7165 (June 30, 2016); *In the Matter of AT&T Corp. v. All American Telephone Co., E-Pinnacle Communications, Inc., Chasecom*, 30 FCC Rcd. 8958 (August 21, 2015); *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 29 FCC Rcd. 7515 (June 25, 2014); *In the Matter of Saturn Telecommunication Services, Inc., v. Bellsouth Telecommunications, Inc., D/B/A AT&T Florida*, 28 FCC Rcd. 4335 (April 4, 2013); *In the Matter of Southwestern Bell Telephone Co., D/B/A AT&T Texas v. UTEX Communications Corp., D/B/A Featuregroup IP*, 27 FCC 1735 (Feb. 10, 2012); *AT&T Corp., v. YMAX Communications Corp.*, 26 FCC Rcd. 5742 (April 8, 2011); *In the Matter of APCC Services, Inc. v. CCI Communications, Inc.; Creative Communications, Inc.; and Link Systems, Inc.*, 25 FCC Rcd. 8224 (June 29, 2010); *North County Communications, Corp. v. Metropes California, L.L.C.*, 24 FCC Rcd. 14036 (Nov. 19, 2009).

⁸⁹ *Id.*

⁹⁰ *Shahin v. Verizon Delaware, LLC*, 29 FCC Rcd. 4200 (2014).

had violated the Communications Act of 1934 by: (1) engaging in “erratic and confusing” billing practices which included excessive charges; (2) improper installation of services, resulting in a disconnection of her home alarm service; and (3) discrimination.⁹¹ After providing a brief synopsis of the background, the Commission walked through each claim raised by Ms. Shahin and discussed the basis for its finding on each issue.⁹² With respect to the first two claims, the Commission relied heavily on the evidence in the record, as well as noting those items markedly absent from the record.⁹³ In short, Ms. Shahin seemed to have offered little factual evidence to support her claims and no legal argument as to why the claims should prevail.

Regarding her final claim of discrimination, the Commission cited the standard that needed to be met and explained why Ms. Shahin’s unsupported allegations did not meet that standard.⁹⁴ Specifically, the Commission noted that, “[allegations] . . . do not amount to evidence that the terms and conditions under which Verizon provided service to Ms. Shahin were in fact different from the terms and conditions under which Verizon provided ‘like’ services to other customers.”⁹⁵ While Ms. Shahin may not have appreciated this outcome, the fact that the Commission listed each issue Ms. Shahin raised and explained *why* each

⁹¹ *Id.* at 4201.

⁹² *Id.*

⁹³ *Id.* at 4202-03.

⁹⁴ *Id.* at 4203 (To show discrimination, the FCC applies the following standard: “(1) there are “like” services at issue; (2) there are differences in the terms and conditions pursuant to which the services are provided; and (3) the differences are not reasonable”).

⁹⁵ *Shahin*, 29 FCC Rcd. at 4204.

claim failed demonstrates legitimacy under the second inside-out legitimacy metric.⁹⁶ The Commission afforded the complainant an opportunity to seek relief for all claims raised and transparently adjudicated each claim.⁹⁷ Cases such as this should continue to undergird the FCC's legitimacy in the eyes of the public, even when the result is unfavorable to the petitioner.

The final inside-out legitimacy metric is whether substantive results are achieved.⁹⁸ The public's perception of an agency as a fair and strong source of legitimacy also depends on how the agency treats issues that come before it. A 2008 case related to a claim of negligent disconnection of toll-free numbers is a good example of how the FCC measures up under this metric.⁹⁹ In that case, the complainant, Mr. DeMoss, acquired toll-free numbers as part of a business plan.¹⁰⁰ In addition to the claim that the respondent, Sprint, engaged in unjust and unreasonable practices resulting in the negligent disconnect of the toll-free numbers, Mr. DeMoss also alleged that Sprint's practices were discriminatory and that Sprint further engaged in willful misconduct.¹⁰¹ For relief, Mr. DeMoss wanted the toll-free numbers restored to him and a one million

⁹⁶ See generally *id.*

⁹⁷ *Id.*

⁹⁸ Hammond & Markell, *supra* note 13, at 350.

⁹⁹ Paul DeMoss *ex rel.* 1-800-America & America's Gift Found., Inc. v. Sprint Communications Co., Memorandum Opinion and Order, L.P., 23 FCC Rcd. 5547 (April 7, 2008) [hereinafter *DeMoss*].

¹⁰⁰ *Id.* at 5548.

¹⁰¹ *Id.* at 5552.

dollar fine to be imposed on Sprint, as well as a separate proceeding to determine damages.¹⁰²

In its analysis of the case, the FCC detailed the factual evidence surrounding both the first and second incidents of disconnection of Mr. DeMoss' toll-free numbers.¹⁰³ The Commission found that Sprint had, indeed, negligently disconnected the toll-free numbers the first time and that Sprint offered "no plausible explanation for [the] discrepancies" in the record and "no credible basis to rebut the assertion that its actions were at least negligent."¹⁰⁴ Relying on precedent, the Commission concluded that Sprint engaged in an unjust and unreasonable practice in violation of section 201(b) of the Communications Act of 1934, but that that its decision to disconnect the toll-free numbers the second time did not amount to willful misconduct.¹⁰⁵ The Commission found no basis to support the claim of discriminatory practices.¹⁰⁶

In terms of substantive relief, Mr. DeMoss wanted to reacquire the toll-free numbers.¹⁰⁷ The Commission invoked a time-worn judicial principle in determining whether Mr. DeMoss was entitled to the equitable relief of reinstatement of the numbers: they balanced the harm to the third party (the individual that Sprint issued the numbers to after having disconnected them from Mr. DeMoss' account) against the harm

¹⁰² *Id.* at 5547.

¹⁰³ *Id.* at 5552-55.

¹⁰⁴ *Id.* at 5552-53.

¹⁰⁵ *DeMoss*, 23 FCC Rcd. at 5553-5554.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 5555.

to Mr. DeMoss if the numbers were not reinstated.¹⁰⁸ A review of the facts in evidence established that while Mr. DeMoss suffered some harm due to the loss of the numbers, the Commission was not persuaded that the most equitable relief would be to potentially harm an “entirely innocent third party.”¹⁰⁹ The Commission also found that Mr. DeMoss’ request for imposition of a one million dollar fine against Sprint should have been grounded in section 503(b) of the Communications Act—a section not included in Mr. DeMoss’ complaint.¹¹⁰ The final piece of relief sought by Mr. DeMoss was a separate proceeding to determine damages.¹¹¹ In concluding that Sprint was liable for the negligent disconnection of Mr. DeMoss’ toll-free numbers, the Commission found that Mr. DeMoss could file a supplemental complaint to pursue damages.¹¹²

It is almost certain that Mr. DeMoss was not completely satisfied with the results of this action. But the FCC was in a difficult position in this case and would be so in any similar case. Simply put, there would be no way to make one party whole without doing some damage to an innocent individual. Although perhaps not entirely satisfactory to the complainant, the FCC did find Sprint liable and held that the complainant could file a supplemental complaint. Both of these findings are substantive outcomes that are consistent with the relief requested. The Commission appeared to have reasonably relied on historical precedent when determining Sprint was liable, and this case should solidify similar

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 5553-5554.

¹¹⁰ *DeMoss*, 23 F.C.C. Red. at 5553-5554.

¹¹¹ *Id.* at 5556.

¹¹² *Id.*

future actions involving negligent disconnection of a toll-free number. Thus, future litigants can have some degree of confidence that they will get similar administrative relief under similar facts.

Another example of the FCC demonstrating internal legitimacy under this metric is its practices related to slamming. Slamming, the practice of changing a telephone customer's telephone service provider without that customer's knowledge or permission, is prohibited by Section 258 of the Telecommunications Act (Act).¹¹³ The actual mechanics of slamming typically involve a telecommunication carrier, or third party verifier (TPV), placing a call to the customer's residence.¹¹⁴ The carrier or TPV will offer new services and attempt to elicit confirmation of a desire to accept the new services or change in carrier from whom-ever answered the phone.¹¹⁵ Sometimes the new service offer was not clearly described, and sometimes the individual that answered the phone was in no position of authority to agree to a change in service.¹¹⁶ The result of such practice was that many people ultimately found themselves on the receiving end of a bill of goods that they did not agree to.

¹¹³ Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (47 U.S.C. § 258).

¹¹⁴ *See, e.g.*, *Clark v. Time Warner Cable*, 523 F.3d 1110 (April 30, 2008).

¹¹⁵ *See, e.g.*, *AT&T Corp. v. FCC*, 323 F.3d 1081 (Feb. 19, 2003) (noting that the Commission's requirement that, "[a] carrier cannot comply with the Commission's verification procedures if it receives confirmation from an individual not authorized to make the change" exceeded the authority Congress granted to the Commission).

¹¹⁶ *See, e.g.*, *In the Matter of Business Discount Plan, Inc., Apparent Liability for Forfeiture*, 14 FCC, Rcd. 340 (December 17, 1998); *In re WorldCom, Inc.*, 17 FCC Rcd. 19696 (Oct. 10, 2002).

Slamming is not only a pernicious practice designed to increase profits on the backs of unsuspecting customers, but it also represents a risk to fair competition in the telecommunications marketplace. Consumer protection is clearly within the FCC's ambit and the agency has broad authority to implement and enforce the communication laws and regulations of the United States.¹¹⁷ Notably, the FCC's rules implementing Section 258 place consumer protection at the forefront, but Section 258 is broader than just consumer protection. In particular, section 258(b) provides that:

Any telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation, in accordance with such procedures as the Commission may prescribe.¹¹⁸

By requiring remuneration via this type of liability provision from the unauthorized, or slamming carrier, to the proper carrier, the FCC fosters a fair marketplace. This liability provision effectively increases the

¹¹⁷ Communications Act of 1934, 47 U.S.C. § 151.

¹¹⁸ Administrative Procedure Act § 258(b); *see also*, *Slamming Policy*, FCC.GOV (Dec. 8, 2015), <https://www.fcc.gov/general/slamming-policy> (providing that “. . . a carrier that violates these procedures and then collects charges from a subscriber shall be liable to the subscriber's *properly-authorized carrier* for all charges collected”) (emphasis added). In fact, where a customer has paid charges to the unauthorized carrier, FCC rules require that the unauthorized carrier pay 150% of the charges to the authorized carrier and the authorized carrier shall then refund or credit the customer 50% of all charges paid by the customer to the unauthorized carrier. *See* 47 C.F.R §§ 64.1140, 64.1170.

odds of carriers filing complaints to recoup lost profits, marshaling even more momentum to the enforcement of Section 258 rules. Moreover, two years after passage of the Act, the FCC issued an order setting forth the rules designed to implement Section 258, which it strictly enforced.¹¹⁹ In doing so, the FCC took a deliberate approach to curb the practice of slamming. Over the years the FCC has found Section 258 liability in a variety of situations, from indisputable violations to more ambiguous scenarios. As an example of the former, in instances where the slamming carrier does not file any response whatsoever to the complaint, the FCC will almost automatically conclude that the failure to respond is “clear and convincing evidence of a violation.”¹²⁰ In still other cases the FCC has found a violation where definitive verification of the customer’s agreement to change carriers could not be confirmed. Telephone verification involving questions such as, “are you at least 18 years of age and authorized by the telephone account owner to make changes to and incur charges on the telephone account?”¹²¹ Additionally, compound questions where a simple response of “yes” cannot necessarily be attributed to the former or latter question and have been found by the FCC to be violations of Section 258.¹²²

The FCC’s aggressive pursuit to eradicate or reduce slamming is an excellent example of an agency using administrative tools to

¹¹⁹ In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, 14 FCC Rcd. 1508 (Dec. 23, 1998).

¹²⁰ *E.g.*, Telecircuit Complaints Regarding Unauthorized Change of Subscriber’s Telecomms. Carrier, 33 FCC Rcd 922 (2018).

¹²¹ *See e.g.*, In the Matter of Advantage Telecomms. Corp., 29 FCC Rcd 9392 (2014).

¹²² *Id.*

bolster inside-out legitimacy. The substantive outcome in these cases provides compelling evidence that an aggrieved customer that has been the victim of slamming stands a decent chance of getting relief from the FCC. Consistent with Hammond and Markell's findings, as well as the body of administrative case law developed by the FCC over the years, it appears that inside-out legitimacy is thriving in the FCC's formal complaint process.

B. FCC Informal Complaints

The FCC permits informal requests for actions, which generally seek an exercise of agency discretion, and are likely unreviewable as a result.¹²³ And like the formal request for action process, it appears that the FCC's decisions under this section carry high indicia of reliability when applying the Inside-Out Legitimacy Metrics.

The FCC's informal requests are governed by 47 C.F.R. § 1.41. Under this provision, requests "should set forth clearly and concisely the facts relied upon, the relief sought, the statutory and/or regulatory provisions (if any) pursuant to which the request is filed and under which relief is sought, and the interest of the person submitting the request."¹²⁴ Consistent with the wording in this section, the FCC exercises its discretion in a wide set of contexts. For example, the FCC has reviewed requests under this section that range from everyday matters,

¹²³ Heckler v. Cheney, 470 U.S. 821 (1985).

¹²⁴ Section 1.41 also provides, "[i]n application and licensing matters pertaining to the Wireless Radio Services, as defined in § 1.904 of this part, such requests may also be sent electronically, via the ULS."

such as letters asking to correct errantly issued licenses,¹²⁵ to petitions that raise fundamental questions of national policy.¹²⁶

For example, in 1971 the FCC considered a demand for action in response to Assistant Secretary for Defense, Daniel Z. Henkin's claim that a CBS documentary, "The Selling of the Pentagon," deliberately misrepresented statements from senior military officials.¹²⁷ Specifically, he asserted that CBS edited a speech from a Colonel MacNeil to errantly suggest that a quotation from the Prime Minister of Cambodia affirming the "domino theory" of international relations was actually the Colonel's language.¹²⁸ Moreover, Secretary Henkin asserted that CBS spliced the video of an interview between himself and reporter Roger Mudd so that his answers appeared to respond to different questions than those that actually prompted the responses.¹²⁹ The Commission concluded that further action "would be inappropriate—and not because the issues involved are insubstantial. Precisely to the contrary, they are so substantial that they reach to the bedrock principles upon which our free and democratic society is founded."¹³⁰ While the FCC criticized the practice of presenting dialogue as responsive to a question the speaker was not addressing, and encouraged journalists to scrutinize

¹²⁵ *E.g.*, Lester J. Schaub, DA-17-569, 32 FCC 4797 (June 12, 2017).

¹²⁶ Complaint Regarding the CBS Program "The Selling of the Pentagon," FCC-71-479, 30 F.C.C.2d 150 (April 28, 1979).

¹²⁷ *Id.* at 150. The Commission also noted that the complaint alleged that CBS did not provide "equal time" to both sides of the issue, and referred that concern to CBS for comment. *Id.*

¹²⁸ *Id.* at 151.

¹²⁹ *Id.*

¹³⁰ *Id.*

such segments, it declined to intervene without evidence of “deliberate distortion,” such as replacing a “yes” with a “no” answer.¹³¹ The Commission concluded that taking action “would be inconsistent with the First Amendment[’s] profound national commitment” to vigorous national debate by embroiling the Commission “deeply and improperly” in broadcasters’ discretion.¹³²

With respect to the first metric of usability, 47 C.F.R. § 1.41 fares well: the FCC has referenced the section in 469 administrative decisions since 1971.¹³³ In the ten years this study covers, 2009 through 2018, the FCC invoked section 1.41 119 times in ruling on various requests for Commission action.¹³⁴ Consequently, petitioners filed at least

¹³¹ *Id.* at 152-53.

¹³² *Id.* at 152.

¹³³ A Westlaw search for administrative decisions within the FCC database that cite to 47 C.F.R. § 1.41 returned 469 results on September 13, 2019.

¹³⁴ Lawrence A. Pagoota, Licensee of Amateur Serv. Station N4LAP, DA 18-476, 33 FCC Rcd. 4617 (2018); Zayne G. Sities, Licensee of Amateur Service Station KI7JFD, DA 18-362, 33 FCC Rcd. 3581 (2018); Petition of AT&T Mobility Spectrum LLC for Waiver of Lower 700 MHZ Band Interim and End-of-Term Geographic Constr. Benchmarks for Alaska B Block License WQIZ358, FCC 18-24, 33 FCC Rcd. 2708 (2018); T-Mobile License LLC, Request for Waiver of Section 27.14(G)(1), FCC 17-163, 32 FCC Rcd. 10619 (2017); Paul D. Studer, Licensee of Amateur Station KK4RPI, DA 17-716, 32 FCC Rcd. 5774 (2017); Jerrell McCullough, Commercial Radio Operator License PG00055257, DA 17-700, 32 FCC Rcd. 5711 (2017); Rob Somers, DA-17-629, 32 FCC Rcd. 5112 (2017); Lester J. Schaub, DA-17-569, 32 FCC Rcd. 4797 (2017); County of Miami-Dade, Florida Licensee of TIS WQAW405 Request for Waiver of Section 90.242(b)(4)(iii) and (iv) of the Commission's Rules, DA 17-512, 32 FCC Rcd. 4137 (2017); Wifredo G. Blanco-Pi, DA 17-372, 32 FCC Rcd. 3100 (2017); Robert Vitanza, DA 17-63, 32 FCC Rcd. 512

(2017); Maritime Commc'ns/Land Mobile, LLC, Debtor-in-Possession, DA 17-450, 32 FCC Rcd. 3907 (2017); Complaints Involving the Political Files of WCNC-TV, Inc., *et al*, DA 17126, 32 FCC Rcd. 1091 (2017); Nattapong Chaumuanphan, Licensee of Amateur Serv. Station KC1DWD, DA 16-578, 31 FCC Rcd. 5372 (2016); Spectrum Networks Group, LLC, DA 16-915, 31 FCC Rcd. 8909 (2016); Steven Blumenstock and Gary Braver, DA 16-872, 31 FCC Rcd. 8648 (2016); William M. Holland Conditional, Limited Request for Waivers, Applications for Involuntary Assignment, Applications for Renewal, DA 16-1469, 31 FCC Rcd. 3920 (2016); Cellco Partnership d/b/a Verizon Wireless and T-Mobile License LLC, DA 15-1407, 30 FCC Rcd. 14080 (2016); Metropolitan Transp. Authority, FCC 16-15, 31 FCC Rcd. 1436 (2016); Todd D. Gray, Esq., Edwin N. Lavergne, Esq., DD 15-1174, 30 FCC Rcd. 11002 (2015); Applications of AT&T and Direct TV for Consent to Assign or Transfer Control of Licenses, FCC 15-94, 30 FCC Rcd. 9131 (2015); Abundant Ephesian 320 Spectrum, LLC, DA 15-806, 30 FCC Rcd. 7240, (2015); Warren Havens, DA 15-551, 30 FCC Rcd. 4642 (2015); Spectrum Networks Grp., LLC Ccd900 Commc'ns, Inc. Sharmel, LLC Finken Tracking & Comm, Inc. Md Commc'ns Matly, Inc. Mellcell, Inc. Ez-Raven Comms, LLC Skygold Techs., LLC, DA 15-439, 30 FCC Rcd. 3509 (2015); Warren C. Havens Envtl. LLC Petition for Reconsideration, DA 15-362, 30 FCC Rcd. 2635 (2015); In the Matter of Specialized Mobile Radio, DA-15-335, 30 FCC Rcd. 2298 (2015); Mark E. Crosby, DA-15-49, 30 FCC Rcd. 162 (2015); In the Matter of Brent D. Cullen, DA-15-168, 30 FCC Rcd. 1081 (2015); In the Matter Touchtel Corp., Assignor, DA 14-1891, 29 FCC Rcd. 16249 (2014); Digis, LLC Txox Commc'ns, LLC, DA 14-1851, 29 FCC Rcd. 15275 (2014); Rudolph J. Geist, Esq., DA 14-1852, 29 FCC Rcd. 15282 (2014); Commercial Mobile Alert Sys., DA-14-1689, 29 FCC Rcd. 13977 (2014); Pappammal Kurian Spectrum Wireless, LLC R F Data Inc. Pcs LLC, DA-14-1520, 29 FCC Rcd. 12699 (2014); Sprint Nextel Corp., FCC 14-136, 29 FCC Rcd. 11549 (2014); Geodesic Networks, LLC, DA 14-1268, 29 FCC Rcd. 10429 (2014); Warren C. Havens, FCC 14-75, 29 FCC Rcd. 6326 (2014); Fibertower Spectrum Holdings LLC Requests for Waiver, Extension of Time, or in the Alternative, Ltd., FCC 14-18, 29 FCC Rcd. 2493 (2014); Telefonica Int'l Wholesale

Servs. USA, Inc. (Lead Applicant), et al., DA 14-83, 29 FCC Rcd. 496 (2014); Mark Crosby, WT12-17, 2014 WL 128970 (2014); Commc'ns/land Mobile, LLC, Debtor-in-Possession Application to Assign Licenses to Choctaw Holdings, LLC, FCC 15-133, 29 FCC Rcd. 10871 (2014); Maritel Inc. *et al*, DA 14-1538, 29 FCC Rcd. 12827 (2014); Warren C. Havens, FCC 14-148, 29 FCC Rcd. 12532 (2014); AT&T Corp., FCC 14-84, 29 FCC Rcd. 6393 (2014); Warren C. Havens, FCC 13-151, 28 FCC Rcd. 16261 (2013); Applications of Educ. Broadband Corp., DA 13-2146, 28 FCC Rcd. 15562 (2013); Paging Sys., Inc. Verde Sys. LLC & Skybridge Spectrum Found. Applications for Assignment of Licenses, DA 13-1787, 28 FCC Rcd. 12606 (2013); Application of Allegany, Cty. of Modification of Private Land Mobile Radio Stations Wqna318 & Wqme708 & Requests for Special Temp. Auth., DA 13-1419, 28 FCC Rcd. 8957 (2013); Mr. Graham Stone Mr. Christopher R. Hardy, DA 13-1380, 28 FCC Rcd. 8475 (2013); Twp. of W. Orange, New Jersey City of New York, New York & New Jersey Transit Corp., DA-13-687, 28 FCC Rcd. 4600 (2013); Implementation of the Pay Tel. Reclassification & Comp. Provisions of the Telecomms. Act of 1996, FCC 13-24, 28 FCC Rcd. 2615 (2013); James H. Schofield, Licensee of Amateur Serv. Station KI6JIM, DA 13-1304, 28 FCC Rcd. 8184 (2013); Applications for Pub. Safety Pool (Conventional) Licenses for Mobile Use of Reconrobotics Video & Audio Surveillance Sys., DA 12-1828, 27 FCC Rcd. 14056 (2012); Paging Sys., Inc., DA 12-1724, 27 FCC Rcd. 13560 (2012); Access 220, LLC, Assignor, & Spectrum Equity, Inc., Assignee, DA 12-1321, 27 FCC Rcd. 9321 (2012); Skywave Broadband Internet, LLC, Donald L. Herman, Jr., Esq., DA 12-1292, 27 FCC Rcd. 9199 (2012); Mr. Thomas W. Adams, Jr. Donald L. Herman, Jr., Esq., DA 12-1293, 27 FCC Rcd. 9201 (2012); Commercial Mobile Alert Sys., DA 12-1267, 27 FCC Rcd. 9096 (2012); Maritel N. Pac., Inc., Maritel S. Pac., Inc., DA 12-1158, 27 FCC Rcd. 8153 (2012); Paging Sys., Inc. & Mar. Commc'ns/land Mobile LLC, DA 12-1131, 27 FCC Rcd. 8028 (2012); Acc Licensee, Inc., DA 12-1086, 27 FCC Rcd. 7584 (2012); Delaware River Port Auth., DA 12-956, 27 FCC Rcd. 7002 (2012); Skybridge Spectrum Found., FCC-12-63, 27 FCC Rcd. 7701 (2012); Gateway Telecomm. LLC DBA Stratuswave Commc'ns, DA 12-936, 27 FCC Rcd. 6302 (2012); Application for Transfer of Control of Progeny Lms LLC

to Progeny Lms Holdings LLC &, DA 12-851, 27 FCC Rcd. 5871 (2012); Requests for Waiver of Various Petitioners to Allow the Establishment of 700 Mhz Interoperable Pub. Safety Wireless Broadband Networks, DA 12-738, 27 FCC Rcd. 5110 (2012); Metro. Area Networks, Inc., DA 12-561, 27 FCC Rcd. 3826 (2012); New Jersey Transit, DA 12-547, 27 FCC Rcd. 3295 (2012); Maritel, Inc., Maritel Alaska, Inc., Maritel Great Lakes, Inc., Maritel Hawaii, Inc., Maritel Mid-Atl., Inc., Maritel Mississippi River, Inc., Maritel N. Atl., Inc., Maritel N. Pac., Inc., Maritel S. Atl., Inc., Maritel S. Pac., Inc., DA 12-537, 27 FCC Rcd. 3256 (2012); Applications for Pub. Safety Pool (Conventional) Licenses for Mobile Use of Reconrobotics Video & Audio Surveillance Sys., 27 FCC Rcd. 948 (2012); Todd Wilson, Licensee of Amateur Serv. Station WH6DWF, DA 12-408, 27 FCC Rcd. 2588 (2012); Davina Sashkin, Esq., DA-12-463, 27 FCC Rcd. 2920 (2012); Maritel, Inc. & Mobex Network Servs., LLC., FCC 11-173, 26 FCC Rcd. 16579 (2011); Cty. of Genesee, New York & Sprint Nextel Corp., DA 11-1846, 26 FCC Rcd. 15549 (2011); Pappammal Kurian Thomas Kurian, DA 11-1800, 26 FCC Rcd. 15177 (2011); Rockne Educ. Television, Inc., Licensee Krisar, Inc. Lessee Albion Cmty. Dev., Inc., Licensee Krisar, Inc. Lessee Krisar, Inc. Lessee Clearwire Spectrum Holdings III, LLC, Sublessee, DA 11-1732, 26 FCC Rcd. 14402 (2011); Verizon Washington DC, Inc. Verizon New York, Inc. at&t California Verizon Virginia, Inc. Verizon New Jersey, Inc. Illinois Bell Tel. Co. Michigan Bell Tel. Verizon Pennsylvania, Inc. Verizon Maryland, Inc. Bell S. Telecomms., Inc. Frontier W. Virginia, Inc. Ohio Bell Tel. Co. Wisconsin Bell, Inc. Verizon Delaware, Inc Alascom, Inc. Gte Sw. Inc DBA Verizon Sw. Verizon California Inc., DA 11-1650, 26 FCC Rcd. 13511 (2011); Carriers Eligible to Receive Universal Serv. Support, DA 11-1336, 26 FCC Rcd. 11067 (2011); Touch Tel Corp., DA 11-1186, 26 FCC Rcd. 9636 (2011); Paging Sys., Inc., DA 11-827, 26 FCC Rcd. 6653 (2011); Touch Tel Corp., DA 11-828, 26 FCCR. 6655 (2011); Paging Sys., Inc., DA 11-680, 26 FCC Rcd. 5913 (2011); Comtronics Corp., DA 11-603, 26 FCC Rcd. 5075 (2011); Aa United Cab Co., DA 11-592, 26 FCC Rcd. 5037 (2011); Motorola, Inc. Amendment of the Comm'n's Rules Concerning Maritime Commc'n, FCC 11-174, 26 FCC Rcd. 16581 (2011); Bradlee J. Beer, P.E., DA 10-2105, 25 FCC Rcd. 15269 (2010);

Application of Repeater Commc'ns Corp. of California for Partial Assignment of Licenses for Stations Wpom425 & Wrw245 to the Cty. of Monterey, California, DA 10-1994, 25 FCC Rcd. 14485 (2010); Applications of Verde Sys., LLC & Envtl. LLC, DA 10-1331, 25 FCC Rcd. 9166 (2010); Jane Haskins, Esq., Paul Madison, Esq., DA 10-763, 25 FCC Rcd. 4686 (2010); Sagamore-hill of Corpus Christi Licenses, LLC c/o Todd Stansbury, Esq. Eagle Creek Broad. of Corpus Christi, LLC c/o Dennis Corbett, Esq. Channel 3 of Corpus Christi, Inc. c/o Robert B. Jacobi, Esq., DA 10-495, 25 FCC Rcd. 2809 (2010); Vizada Servs. LLC & Vizada, Inc., DA 10-357, 25 FCC Rcd. 2029 (2010); Directv Enters, LLC, DA 10-113, 25 FCC Rcd. 440 (2010); Amts Consortium, LLC, FCC 10-5, 25 FCC Rcd. 526 (2010); Fox Tel. Stations, Inc., DA 10-995, 25 FCC Rcd. 7074 (2010); World Data Pr Inc., DA 09-2626, 24 FCC Rcd. 14648 (2009); Pappammal Kurian, DA 09-2526, 24 FCC Rcd. 14411 (2009); Iridium Holdings LLC, DA-09-1809, 24 FCC Rcd. 10725 (2009); Nat'l Sci. & Tech. Network, Inc., DA 09-1786, 24 FCC Rcd. 10623 (2009); Samuel Moses Pr Kevin R. Nida James A. Kay, Jr., DA 09-1474, 24 FCC Rcd. 8857 (2009); Application of Radio Commc'ns Ass'n, DA 09-1433, 24 FCC Rcd. 8564 (2009); Mr. Gary Sabalone, DA 09-1409, 24 FCC Rcd. 8465 (2009); Mr. Jack Najork, DA 09-1378, 24 FCC Rcd. 8354 (2009); Aquinas High Sch. Armored Sch. Dist. #9 Bulloch Cty. Bd. of Educ. Canton R-V Sch. Dist. Clark Cty. R-I Sch. Dist. Cook Cty. Sch. Cooter Reorganized Sch. Dist. R-IV Glynn Cty. Sch. Sys. Glynn Cty. Sch. Sys. Holton Unified Sch. Dist. Oakdale High Sch. Santa Fe Trail Usd #434 S. Pemiscot Dist. R-V Stromsburg Sch. Dist. #10 Trenton Special Sch. Dist. Tri Cty. R-VII Sch. Turner, DA 09-1331, 24 FCC Rcd. 8049 (2009); Jrz Assocs., DA 09-1334, 24 FCC Rcd. 8074 (2009); Lois Hubbard, DA 09-1336, 24 FCC Rcd. 8080 (2009); Sweet Briar Inst., DA 09-1337, 24 FCC Rcd. 8088 (2009); 116 Late-Filed Applications for Renewal of Educ. Broadband Serv. Stations in the Matter of Fifty-Four Late-Filed Applications for Extension of Time to Construct Educ. Broadband Serv. Stations, DA 09-1340, 24 FCC Rcd. 8108 (2009); Utopia Indep. Sch. Dist., DA 09-1341, 24 FCC Rcd. 8137 (2009); Nevada Cogeneration Assocs. Station Wpmr751, Las Vegas, Nevada, DA 09-1056, 24 FCC Rcd. 5501 (2009); Jose N. Francis Joy N. Francis Satheesmoorthy Punniamurthy Richard R. Susainathan, DA 09-

one quarter of the petitions triggering a response under section 1.41 in the past ten years.¹³⁵ Thus, citizen interest in using the process appears sustained over a long period of time, and, if anything, is more active in the past decade than years prior. More specifically, the following table shows the number of times the FCC has used section 1.41 to resolve requests for Commission action in the past ten years.

889, 24 FCC Rcd. 4834 (2009); Pappammal Kurian, DA 09-891, 24 FCC Rcd. 4842 (2009); Cgg Veritas Land, Inc., DA 09-848, 24 FCC Rcd. 4641 (2009); License Commc'ns Servs., Inc., DA 09-617, 24 FCC Rcd. 3228 (2009); Nat'l Gmdss Implementation Task Force, DA 09-612, 24 FCC Rcd. 3215 (2009); Wireless Telecomms., Inc., DA 09-603, 24 FCC Rcd. 3162 (2009); Howard A. Schmidt, Licensee of Amateur Service Station AD7ZS, DA 09-1418, 24 FCC Rcd. 8977 (2009); David E. Sanders, Licensee of Amaterua Service Station W4DES, DA 09-778, 24 FCC Rcd. 4104 (2009); In the Matter of Motorola, Inc., FCC 09-116, 25 FCC Rcd. 455 (2009). For ease of reference, each decision will be referred to by its FCC number. For example, DA 09-603 refers to Wireless Telecommunications, Inc., DA 09-603, 24 FCC Rcd. 3162 (2009).

¹³⁵ See *supra* note 134.

Year	Decisions
2018	3
2017	10
2016	7
2015	9
2014	14
2013	8
2012	21
2011	13
2010	9
2009	25

The table illustrates that in recent years, the volume of requests has stayed relatively consistent and has generally varied from around ten to twenty.¹³⁶ This ongoing, consistent use suggests that the public views the FCC process for submitting requests for informal action as worthwhile.¹³⁷

¹³⁶ While the FCC issued the most decisions under section 1.41 in 2009 and the fewest in 2018, the decisions do not describe an outside circumstance that would account for these variances. *Contra infra* note 141 and accompanying text (describing how the accident at the Japanese Nuclear Power Plant Fukushima Dai-ichi led to a greater number of petitions at the NRC).

¹³⁷ Hammond & Markell, *supra* note 13, at 343.

While there are parallels with the results of the EPA case study, the petitions the FCC dispositions under section 1.41 differ markedly from the EPA petitions studied by Professors Hammond and Markell in one important respect: frequently, the FCC considers letters and requests for action under section 1.41 that do not invoke that section at all.¹³⁸ For example, the FCC has considered requests for waivers of Commission rules to permit late filed answers under section 1.41 even when they have not invoked that section.¹³⁹ In fact, Petitioners only clearly invoked section 1.41 in 35 of the 121 cases covered by this study, as opposed to the “vast majority,” that invoked the EPA’s process in Professors Hammond and Markell’s study.¹⁴⁰ Around a dozen other FCC decisions do not clearly specify whether the petitioners strictly invoked section 1.41 but instead characterize the incoming request as an “informal request” for action and cite section 1.41 in resolving the concern.¹⁴¹ Thus, more than half the FCC decisions under study reflect a petition initially directed at another process, such as a motion to waive a filing deadline for an answer, that the agency redirected to section 1.41.¹⁴²

¹³⁸ Compare *id.* at 346 with, e.g., *Fibertower Spectrum Holdings LLC (Requests for Waiver, Extension of Time, or in the Alternative, Ltd.)*, FCC-14-18, 29 FCC Rcd 2493, 2507 (2014) (considering arguments in motion for consideration as informal request for petition action under 47 C.F.R. 1.41).

¹³⁹ *Wireless Telecomms., Inc.*, DA-09-603, 24 FCC Rcd 3162, 3167 (2009).

¹⁴⁰ Hammond & Markell, *supra* note 13, at 346.

¹⁴¹ E.g., *Mr. Jack Najork*, DA-09-1378, 24 FCC Rcd 8354, 8354 (2009).

¹⁴² Only petitions in the following cases clearly invoked section 1.41: DA-17-629; DA-17-450; DA-17-126; FCC 16-15; DA-15-1774; DA-15-551; DA-15-362; DA-15-335; DA-15-168; FCC-15-133; DA-14-1538; FCC 14-148; DA-14-1891; FCC-14-84; DA-14-83; FCC-14-75; FCC-14-18; FCC-13-151; DA-

Thus, in addition to serving as a clearinghouse for informal requests for action, section 1.41 also provides a mechanism for the Commission to disposition concerns that do not fit cleanly into other agency processes. This may appear to suggest that public engagement with section 1.41 is not as robust as an initial review suggests. However, to the extent the purpose of section 1.41 is for the Commission to act on a request for action that does not meet the formal filing requirements for other agency processes (e.g., 47 C.F.R. § 1.720), a willingness to consider requests that do not explicitly invoke section 1.41 or errantly invoke a different section appears to serve the purpose of the informal requests for action process. Moreover, the public's continued filing of such amorphous or errant requests indicates a general confidence in the FCC's willingness to fairly entertain a variety of petitions for action that may not clearly fit into the agency's existing process.¹⁴³

The FCC's treatment of those cases also reveals a high level of responsiveness to the concerns raised in the filings, meeting the second inside-out legitimacy metric. To some degree, responsiveness is in the eye of the beholder. As discussed above, responsiveness has two components: (1) treatment, acknowledging concerns raised, and (2) reasoning, explaining the basis for the agency's response to those concerns.¹⁴⁴ While the FCC's responses are not always lengthy, these decisions routinely: place the request within its procedural context;

13-1787; DA-13-1380; DA-12-1724; DA-12-1158; DA-12-851; DA-12-738; DA-12-537; DA 12-463; FCC-11-174; FCC-11-173; DA-11-1650; DA-11-1336; DA-11-1186; DA-11-827; DA-11-828; DA-11-603; DA-10-1994; DA-10-1331; DA-10-995; DA-10-357; DA-09-1809; DA-09-1786; DA-09-1334; DA-09-1336; DA-09-1337; DA-09-1340; DA-09-1341; FCC-09-116.

¹⁴³ Hammond & Markell, *supra* note 13, at 346.

¹⁴⁴ *Id.* at 329.

explain the nature of the claim; if it is styled as a request for relief under a different section, explain why it did not meet that section's requirements; and provide at least some explanation for the determination on whether to take action. For purposes of this article, decisions that met these minimum criteria are "responsive." In the past ten years only five of FCC's informal action cases have not met these minimum requirements for responsiveness in some respect, meaning that the FCC is responsive in over 95% of the decisions that invoke section 1.41.¹⁴⁵

The FCC demonstrated these principles in its decision of *New Jersey Transit*.¹⁴⁶ In that proceeding, New Jersey Transit (NJ Transit) filed a petition for reconsideration of a cancellation of a license for a radio station that operated on two microwave frequencies to provide "mission critical communications for [its] bus and police operations."¹⁴⁷ NJ Transit had inadvertently requested that the FCC cancel the license and neglected to respond to a notification from the FCC staff informing

¹⁴⁵ See *Vizada Servs. LLC*, DA-10-357, 25 FCC Rcd. 2029, 2054 (2010) (not explicitly acknowledging but not responding to a recommendation from the Department of Justice, submitted under section 1.41, regarding a foreign license transfer); *ReconRobotics Video & Audio Surveillance Sys.*, DA-12-1828, 27 FCC Rcd. 14056, 14059 (2012) (Applications for Pub. Safety Pool Licenses) (granting motion to withdraw without addressing section 1.41 request); *Illinois Pub. Telecomms. Assoc.*, FCC-13-24, 28 FCC Rcd 2615, 2615 (2013) (granting motion to consolidate claims without addressing section 1.41 request); *Paging Sys., Inc.*, DA-13-1787, 28 FCC Rcd. 12606, 12608 (2013) (Applications for assignment of licenses) (denying section 1.41 request due to an insufficient basis without additional explanation); *Pappammal Kurian*, DA 14-1520, 29 FCC Rcd 12699, 12701 (2014) (failing to address section 1.41 request because relief already obtained).

¹⁴⁶ *New Jersey Transit*, DA-12-547, 27 FCC Rcd. 3295, 3297 (2012).

¹⁴⁷ *Id.* at 3295-96 (alteration in original).

NJ Transit that they could file a petition for reconsideration within 30 days if the request had been made in error.¹⁴⁸ Rather than file the petition within 30 days, NJ Transit filed the petition for reconsideration over 120 days after the FCC issued the notification.¹⁴⁹ The FCC clearly articulated the nature of the request and noted that it was untimely.¹⁵⁰ Next, the FCC treated the petition as a request under section 1.41.¹⁵¹ The FCC observed the significance of NJ Transit's license to public safety, noted that NJ Transit stated that losing the license would lead to a hole in operations for the southern part of the state, and found that no evidence on the record suggested otherwise.¹⁵² Thus, the FCC concluded that reinstating the license would be in the public interest.¹⁵³

Thus, the FCC appears to generally engage in reasoned decision making when invoking section 1.41. However, one aspect of the FCC's practice appears to consistently lack the same level of responsiveness: determining whether to treat a pleading that does not meet the requirements of another section as a section 1.41 pleading. In contrast to *NJ Transit*, in *Maritime Communications*,¹⁵⁴ the FCC considered a request to deny or dismiss a renewal application that also asked, in the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 3296.

¹⁵² New Jersey Transit, 27 FCC Rcd. at 3296-97.

¹⁵³ *Id.*

¹⁵⁴ In the Matter of Maritime Commc'ns/Land Mobile, LLC, Debtor-In-Possession, 32 FCC Rcd. 3907, 3912 (2017).

alternative, for relief under section 1.41.¹⁵⁵ The FCC determined that the petitioner lacked standing to bring its request and cursorily denied the claim by noting that the Commission routinely denies section 1.41 claims where another avenue for relief exists.¹⁵⁶ In many ways, *Maritime Communications* is hard to reconcile with *NJ Transit*. Both cases involved claims that did not meet specific procedural requirements, standing and timeliness respectively, yet the FCC considered one claim under section 1.41 but not the other.¹⁵⁷ Neither case sought to identify what factors the FCC would use in deciding to treat a defective pleading as a section 1.41 request or why the request would meet those criteria.¹⁵⁸ Therefore, once the FCC decides to treat a filing as a 1.41 request, it appears to provide a high level of responsiveness, but the underlying determination of whether to invoke 1.41 appears less responsive.

Finally, the FCC's informal request for action process fares well under the third inside-out legitimacy metric: substantive outcomes. While substantive outcomes do not necessarily track legitimacy, a diversity of results do suggest that the process may be fairer than one that only yields one result.¹⁵⁹ Of the 119 cases under consideration, the FCC denied the petition in 74 of the cases, granted the petition in 37, and

¹⁵⁵ *Id.* at 3907.

¹⁵⁶ *Id.* at 3912 n.41.

¹⁵⁷ Compare *New Jersey Transit*, DA-12-547, 27 FCC Rcd 3295, 3296 (2012) with *Maritime Commc'ns/Land Mobile, LLC, Debtor-In-Possession*, 32 FCC Rcd. 3907, 3912 & n.41 (2017).

¹⁵⁸ See *New Jersey Transit*, 27 FCC Rcd at 3296; *Maritime Commc'ns/Land Mobile, LLC, Debtor-In-Possession*, 32 FCC Rcd. at 3912, n.41.

¹⁵⁹ Hammond & Markell, *supra* note 13, at 350.

provided partial relief in eight.¹⁶⁰ Thus, the FCC provided some type of relief in almost 38% of the cases it considered.¹⁶¹ By way of comparison, the EPA process studied by Professors Hammond and Markell led to withdrawal proceedings less than 10% of the time and some type of relief in nearly 53% of the cases studied.¹⁶² As a result, the high percentage of cases in which the FCC provides some type of relief indicates that the section 1.41 process has high indicia of internal reliability.

In conclusion, it appears that section 1.41 carries a high level of internal legitimacy despite a lack of judicial review. Under Professor Hammond and Markell's metrics, section 1.41 has been frequently invoked, generally yields well-reasoned responses, and produces a diversity of outcomes. While the FCC at times does not clearly articulate

¹⁶⁰ The Commission referenced section 1.41 in concluding language in four decisions, but did not clearly explain how it factored into its reasoning. Federal-State Joint Board on Universal Service Kingsgate Telephone, Inc. Petition for Waiver of the Definition of "Study Area" in the Appendix – Glossary of Part 36, DA-14-772, 29 FCC Rcd. 5919, 5922 (2014); Freeport-McMoran Chino Mines Company Request for Waiver of Section 90.259(A) of the Commission's Rules, DA-14-544, 29 FCC Rcd. 4090, 4092 (2014); Smartcomm License Services, LLC, DA-14-49, 29 FCC Rcd. 302, 308 (2014); Vermont Transco LLC, DA-11-1103, 26 FCC Rcd. 8820, 8822 (2011).

¹⁶¹ The FCC granted relief in the following cases: DA-18-476; DA-18-362; FF-18-24; FCC-17-163; DA-17-716; DA-17-700; DA-17-569; DA 16-578; DA-13-1304; DA 12-408; DA-09-1418; DA-09-778; DA-16-872; DA-16-1469; DA-15-551; DA-15-439; DA-15-335; DA-14-1851; DA-14-1689; FCC-14-136; DA-14-1268; DA-14-83; WT-12-17; DA-13-2146; DA-13-1380; DA-13-687; FCC-13-24; DA-12-1828; DA-12-738; DA-12-547; DA-11-1800; DA-11-1650; DA-11-592; DA-10-763; DA-10-357; DA-09-1809; DA-09-1786; DA-09-1433; DA-09-1056; DA-09-889.

¹⁶² Hammond & Markell, *supra* note 13, at 350-51.

why it places a claim in the section 1.41 process, once claims are within that process, the FCC does state the claim and provides a well-supported answer.

C. NRC Section 2.206 Proceedings

The NRC is an independent agency responsible for ensuring the safe use of radioactive materials for beneficial civilian purposes while protecting people and the environment.¹⁶³ The NRC regulates commercial nuclear power plants and other uses of nuclear materials through licensing, inspection and enforcement of its requirements.¹⁶⁴ Under the Atomic Energy Act of 1954,¹⁶⁵ as amended, many of the NRC's actions are subject to hearings and judicial review. However, like the EPA and FCC, the NRC also has a process for the public to raise concerns with respect to existing licensees that is not subject to judicial review.¹⁶⁶ And

¹⁶³ See *About NRC*, NRC, <https://www.nrc.gov/about-nrc.html> (last visited March 12, 2020).

¹⁶⁴ *Id.*

¹⁶⁵ The Atomic Energy Act of 1954, 42 U.S.C. §§ 2239 (1954).

¹⁶⁶ While federal courts have jurisdiction over agency decisions under section 2.206, they have indicated that NRC decisions under section 2.206 represent an exercise of discretion that is generally not reviewable. *Mass. Pub. Interest Research Grp, Inc. v. NRC*, 852 F.2d 9, 14-19 (1st Cir. 1987) (*citing* *Heckler v. Cheney*, 470 U.S. 821 (1985)). See also *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985) (determining that courts do have initial jurisdiction to review denials under section 2.206 and remanding for further review). However, the decisions have noted that a court may take review in extraordinary cases where the agency has completely abdicated its responsibility to regulate. *Mass. Pub. Interest Research Grp, Inc.*, 852 F.2d at 19.

like the EPA and FCC, the NRC appears to build inside-out legitimacy when making decisions under this process.¹⁶⁷

Specifically, the NRC's regulations at 10 C.F.R. § 2.206 provide that, "Any person may file a request to institute a proceeding pursuant to . . . modify, suspend, or revoke a license, or for any other action as may be proper." The agency has established an extensive process for resolving these petitions. After a section 2.206 petition is received, the agency establishes a Petition Review Board (PRB) to determine whether the petition should be screened out from further consideration based on a set of established criteria (i.e., whether the agency has previously considered the issue and whether the petition states sufficient facts to justify the relief sought).¹⁶⁸ Once screened into the section 2.206 process, the NRC provides the petitioner with an opportunity to address the PRB.¹⁶⁹ After the PRB meeting, the NRC provides a draft decision to the petitioner and any impacted licensee for comment.¹⁷⁰ If a petitioner or licensee provides comments, the agency will address the comments either in an appendix or within the text of the decision.¹⁷¹ Finally, after the

¹⁶⁷ The section 2.206 process has been sharply critiqued by some members of the public over the years. *E.g.*, Richard Webster & Julia LeMense, *Spotlight on Safety at Nuclear Power Plants: the View from Oyster Creek*, 26 PACE ENVTL. L. REV. 365, 368-70 (2009). This article does not seek to respond to their specific concerns, but rather only applies the metrics developed by Professors Hammond and Markell to the NRC.

¹⁶⁸ U.S. Nuclear Regulatory Comm'n, Management Directive 8.11, Directive Handbook, Review Process for 10 C.F.R. § 2.206 Petitions (Mar. 1, 2019), at 4, 8.

¹⁶⁹ *Id.* at 13.

¹⁷⁰ *Id.* at 22-23.

¹⁷¹ *Id.*

agency issues the final decision, the Commissioners may review the decision to determine whether to take *sua sponte* review at its discretion.¹⁷²

In terms of the first metric of usability, a search of publicly available NRC enforcement decisions indicates that the agency has issued at least 428 decisions under 10 C.F.R. § 2.206 since 1979.¹⁷³ During the 2009-2018, the agency issued forty-two decisions in response to 2.206 petitions.¹⁷⁴ While this number may reflect a decreased interest in

¹⁷² *Id.* at 24-25.

¹⁷³ A Westlaw search in the Nuclear Regulatory Commission database for “DD” in the caption returned 428 results on April 23, 2019.

¹⁷⁴ All Power Reactor Licensees, DD-18-3, 88 N.R.C. 69 (2018); United States Army Installation Management Command (Pohakuloa Training Area), DD-18-2, 87 N.R.C. 163 (2018); Exelon Generation Co., LLC (Braidwood Station, Units 1 and 2 and Byron Station, Units Nos. 1 and 2) DD-18-1, 87 N.R.C. 111 (2018); All Operating Reactor Licensees, DD-17-4, Rev., 86 N.R.C. 229 (2017); Pacific Gas and Electric, Co. (Diablo Canyon Power Plant, Units 1 and 2), DD-17-03, 85 N.R.C. 195 (2017); Pacific Gas and Electric, Co. (Diablo Canyon Power Plant, Units 1 and 2), DD-17-02, 85 N.R.C. 136 (2017); Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point Unit 2, LLC, Entergy Nuclear Indian Point Unit 3, LLC (Indian Point Nuclear Generating Unit 2, Indian Point Nuclear Generating Unit 3), DD-17-01, 85 N.R.C. 119 (2017); Florida Power & Light Co. (St. Lucie Plant Unit 2), DD-16-2, 84 N.R.C. 1 (2016); Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station) Dominion Energy Kewaunee (Kewaunee Power Station), DD-16-01, 83 N.R.C. 115 (2016); Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), DD-15-10, 82 N.R.C. 201 (2015); Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), DD-15-09, 82 N.R.C. 274 (2015); Entergy Nuclear Operations, Inc (James Fitzpatrick Nuclear Plant, Pilgrim Nuclear Power Station, Vermont Yankee Nuclear Power Station), DD-15-8, 82 N.R.C. 107 (2015); Southern California

Edison (San Onofre Nuclear Generating Station, Units 2 and 3), DD-15-7, Rev. 82 N.R.C. 257 (2015); All Operating Reactor Licensees, DD-15-6, 81 N.R.C. 884 (2015); Omaha Public Power District Nebraska Pub. Power District (Fort Calhoun Station, Unit 1, Cooper Nuclear Station) DD-15-5, 81 N.R.C. 877 (2015); Omaha Public Power District (Fort Calhoun Station, Unit 1) DD-15-4, 81 N.R.C. 869, (2015); Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), DD-15-3, 81 N.R.C. 713 (2015); Entergy Nuclear Operations, Inc (James Fitzpartrick Nuclear Plant), DD-15-2, 81 N.R.C. 205 (2015); All General Electric Mark I Boiling-Water Reactor Operating Licensees, DD-15-1, 81 N.R.C. 193 (2015); Exelon Generation Company, LLC (Braidwood Station, Units 1 and 2 and Byron Station, Units Nos. 1 and 2) DD-14-5, 80 N.R.C. 205 (2014); Sci. Applications Int'l Co. (SAIC), DD-14-4, 79 N.R.C. 506 (2014); Duke Energy Florida, Inc. (Crystal River Unit 3 Nuclear Generating Plant), DD-14-3, 79 N.R.C. 500 (2014); All Operating Reactor Licensees, DD-14-2, 79 N.R.C. 489 (2014); Florida Power & Light Co. (St. Lucie Plant Units 1 and 2 and Turkey Point Nuclear Generating Units 3 and 4), DD-14-1; 79 N.R.C. 7 (2014); Duke Energy Progress, Inc (Brunswick Steam Electric Plant Units 1 and 2), DD-13-3, 78 N.R.C. 571 (2013); Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), DD-13-2, 78 N.R.C. 185 (2013); Entergy Nuclear Operations, Inc. and Entergy Nuclear Indian Point 2, LLC (Indian Point Nuclear Generating Unit No. 2), DD-13-1, 77 N.R.C. 347 (2013); Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC., Entergy Nuclear Indian Point 3, LLC. (Indian Point Nuclear Generating Unit Nos. 1, 2, and 3), DD-12-3, 76 N.R.C. 416 (2012); Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), DD-12-02, 76 N.R.C. 391 (2012); Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), DD-12-01, 75 N.R.C. 573 (2012); Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) and Entergy Operations, Inc. (River Bend Station), DD-11-07, 74 N.R.C. 787 (2011); Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), DD-11-06, 74 N.R.C. 420 (2011); FirstEnergy Nuclear Operating Co. (Three Mile Island Nuclear Station, Unit 2), DD-11-04, 73 N.R.C. 713 (2011); Entergy Nuclear Vermont Yankee, LLC

pursuing the 2.206 process in the past decade when compared to preceding years, the following table suggests that public engagement with

and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), DD-11-03, 73 N.R.C. 375 (2011); FirstEnergy Nuclear Operating Co. (Davis- Besse Nuclear Power Station, Unit 1), DD-11-02, 73 N.R.C. 323 (2011); Entergy Vermont Yankee Operations and Entergy Nuclear Operations, LLC, DD-11-01, 73 N.R.C. 7 (2011); Idaho State Univ. (Idaho State Univ. AGN-201), DD-10-03, 72 N.R.C. 171 (2010); Prairie Island Nuclear Generating Plant, Units 1 and 2, DD-10-02, 72 N.R.C. 163 (2010); Turkey Point Units 3 and 4, DD-10-01, 72 N.R.C. 149 (2010); Donald C Cook, Unit 1, DD-09-02 70 N.R.C. 899 (2009); Indian Point Units 2 and 3, DD-09-01, 69 N.R.C. 501 (2009). For ease of reference, NRC decisions will be referred to by their director's decision number. For example, Donald C Cook, Unit 1, DD-09-02 70 N.R.C. 899 (2009); Indian Point Units 2 and 3, DD-09-01, 69 N.R.C. 501 (2009) will be referred to as DD-09-01.

the agency under 2.206 has at least remained relatively constant in recent years.

Year	Decisions
2018	3
2017	4
2016	2
2015	10
2014	5
2013	3
2012	3
2011	7
2010	3
2009	2

The above table shows that while the agency only issues a handful of decisions responding to petitions under 2.206 per year, the number does not vary greatly from year to year. While the agency experienced a slight spike in 2.206 petitions in 2015, four of these petitions stemmed from the accident at the Japanese Fukushima Dai-ichi reactor in 2011.¹⁷⁵

Moreover, the number of decisions does not fully reflect public involvement with section 2.206. First, some petitions may not meet the NRC's screening criteria, discussed above, and therefore would not

¹⁷⁵ All Operating Reactor Licensees, DD-15-6, 81 N.R.C. 884 (2015); Omaha Pub. Power (Fort Calhoun Station, Unit 1), Dist. Nebraska Pub. Power Dist. (Cooper Nuclear Station) DD-15-5, 81 N.R.C. 877 (2015); Omaha Pub. Power Dist. (Fort Calhoun Station, Unit 1) DD-15-4, 81 N.R.C. 869 (2015); All Gen. Elec. Mark I Boiling-Water Reactor Operating Licensees, DD-15-1, 88 N.R.C. 193 (2015).

compel the agency to issue a decision under section 2.206.¹⁷⁶ Additionally, some of these final decisions consolidated multiple petitions into one proceeding.¹⁷⁷ Thus, the number of petitions actually filed over the period in question is greater than the figures shown in the table. While the agency does not formally publish the number of requests received per year, an audit from the Office of the NRC Inspector General indicated that the agency received thirty eight petitions under section 2.206 from 2013-2016.¹⁷⁸ Thus, the frequency with which the public invokes the 2.206 process is likely much higher than suggested by the number of decisions.

Additionally, unlike the FCC's section 1.41 process, the vast majority of section 2.206 petitions clearly identified section 2.206 as the basis for the relief sought; whereas petitioners only invoked section 1.41 in 35 of the 121 FCC cases, NRC petitioners explicitly requested relief in 38 of the 41 decisions for which data is available.¹⁷⁹ In the remaining three cases, the petitioners filed requests for adjudicatory hearings that the Commission referred to the staff.¹⁸⁰

¹⁷⁶ See *infra* notes 173 and 174 and accompanying text.

¹⁷⁷ Entergy Nuclear Operations, Inc. (Indian Point Units 2 and 3), CLI-09-01, 69 N.R.C. 501, 502 (2009).

¹⁷⁸ OFFICE OF THE INSPECTOR GEN., U.S. NUCLEAR REGULATORY COMM'N, DEF. NUCLEAR FACILITIES SAFETY BD., AUDIT OF NRC'S 10 C.F.R. 2.206 PETITION REVIEW PROCESS, OIG-17-23 (2017).

¹⁷⁹ One decision is not publicly available.

¹⁸⁰ S. Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), DD-15-7, 82 N.R.C. 257, 257 (2015) (Revised); Fla. Power & Light Co. (St. Lucie Nuclear Power Plant), DD-16-2, 84 N.R.C. 1, 1 (2016); Pac. Gas & Elec.

The NRC's section 2.206 process also fares well in the second Inside-Out Legitimacy Metric, responsiveness. As noted above, under the *Inside Out* framework, responsiveness includes accurately restating the concern and providing a reasoned response to the concern. In all of the cases for the period studied the NRC clearly labelled the concerns raised by the petitioner.¹⁸¹ Moreover, the NRC also provided the petitioner with an opportunity to address the deciding officials, in person or over the telephone, and clarify the nature and bases underlying the petition.¹⁸² In light of these meetings, the agency frequently added new claims to the petition or refined existing claims.¹⁸³ The studied decisions indicate that petitioners requested such a meeting in at least 32 of the 41 cases studied, about three quarters of the time.¹⁸⁴ Moreover, before finalizing the decision, the NRC provided a draft copy to petitioners and requested comments.¹⁸⁵ The agency received comments on the draft decision in 20 of the cases studied, or just under half the time.¹⁸⁶

Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), DD-17-2, 85 N.R.C. 136, 136 (2017).

¹⁸¹ See *supra* note 174.

¹⁸² See *supra* note 172.

¹⁸³ E.g., In re All Operating Reactor Licensees, 81 N.R.C. 884, 884-85 (June 17, 2015) (noting that the Petitioner's initial claim actually had four separate bases).

¹⁸⁴ The only cases where petitioners did not request meetings were DD-19-02, DD-11-01, DD-11-02, DD-11-07, DD-14-02, DD-15-01, DD-15-04, DD-16-02, DD-17-02.

¹⁸⁵ See *supra* note 173.

¹⁸⁶ Petitioners provided comments in DD-10-01, DD-10-02, DD-11-02, DD-11-04, DD-11-06, DD-12-02, DD-12-03, DD-13-2, DD-14-4, DD-15-2, DD-

While petitioners frequently provided comments critiquing the agency's reasoning, no petitioner alleged that the agency significantly misstated the underlying request; as a result, it appears that the NRC successfully restated the incoming complaint in all of the decisions.¹⁸⁷

Regarding the other aspect of the second metric, reason-giving, the agency also performed well. Like for the FCC informal complaint process, this article considered whether the agency provided some explanation for its determination on each claim raised in the incoming request. Every case studied provided some explanation for the agency's response to the petition and frequently cited other inspections, reports, or agency processes that addressed the underlying concern. In some cases, the NRC conducted further inspections or asked the licensee for additional information to resolve the incoming petition.¹⁸⁸ Additionally, when the NRC received comments on a draft decision, the agency provided specific responses in the vast majority of cases; in the 20 cases in which the agency received comments on the draft, the agency only provided a generic assertion that the decision was correct three times.¹⁸⁹ As

15-3, DD-15-7, Rev., DD-15-8, DD-15-9, DD-15-10, DD-16-01, DD-17-01, DD-17-03, DD-17-04, Rev., DD-18-2.

¹⁸⁷ See *supra* note 177.

¹⁸⁸ E.g., Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), DD-15-10, 82 N.R.C. 201, 203-06 (2015). As noted above, some petitions screen out of the section 2.206 process and as such do not generate a formal agency decision in response; the agency reason giving in these circumstances may be less robust and could provide a fruitful area for further research.

¹⁸⁹ In re Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), 82 N.R.C. 274, 293 (Oct. 30, 2015); In re Energy Nuclear Operations, Inc. (James A. FitzPatrick Nuclear Power Plant), 81 N.R.C. 205, 211 (Oct. 17,

a result, the agency was fully responsive to all incoming concerns in 38 of 41 cases, over 90%, and provided a response to at least the incoming petition itself in all cases.¹⁹⁰ However, as noted above, a large number of petitions screen out of the NRC process before the agency issues a final decision.¹⁹¹ Because these petitions do not yield a final decision, they are outside the scope of this study; but the letters sent to petitioners in these cases may not be as responsive as the final agency decisions.¹⁹²

The agency response in Director's Decision 15-6, All Operating Reactor Licensees, provides a representative example of the level of explanation the agency provides in response to a petition that screens into the section 2.206 process. In that decision, the NRC responded to a petition based on the accident at the Fukushima Dai-ichi nuclear power plant in Japan that followed a large earthquake and tsunami.¹⁹³ Specifically, the petition requested that the NRC (1) order the immediate shutdown of all plants near fault lines, (2) order the immediate shutdown of all reactors "employing the GE Mark I containment design" (the design of the reactors at Fukushima), (3) advise other countries of significant

2014); *In re Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4)*, 72 N.R.C. 149, 160 (July 9, 2010).

¹⁹⁰ *Id.*

¹⁹¹ *See supra* note 173 and accompanying text.

¹⁹² *See supra* note 142. Examining the extent to which these responses also meet the Hammond and Markell metrics for responsiveness could be an area for further study.

¹⁹³ *In re All Operating Reactor Licensees*, 81 N.R.C. 884, at 884 (June 17, 2015) (Under 10 C.F.R. § 50.54(f), in certain cases the agency may send a licensee a letter requesting additional information to determine whether the license should be modified, suspended, or revoked).

flaws in that design, and 4) immediately revoke all 20 year license extensions previously granted to operating reactors.¹⁹⁴

With respect to the first request, the agency observed that shortly following the accident, the NRC formed a near term task force (NTTF) of expert agency officials to study the event and provide recommendations to the Commission for action.¹⁹⁵ As part of its report, the NTTF determined that continued operation of reactors did not impose an immediate safety threat.¹⁹⁶ Nonetheless, the NTTF did provide a number of long-term recommendations to ensure that U.S. reactors continued to operate safely.¹⁹⁷ In response to the petition, the NRC also noted that a number of agency actions taken in response to these recommendations addressed seismic safety.¹⁹⁸ These measures included sending letters to licensees under 10 C.F.R. § 50.54(f) for information on reevaluated seismic hazards, follow-up actions based on licensees responses to those letters, and orders that required licensees to adopt mitigating strategies and equipment that would address a severe accident, including those initiated by a severe seismic event, such as the event at Fukushima Dai-ichi.¹⁹⁹ Thus, the NRC declined to take any action in response to the first claim because ongoing agency processes already addressed the concerns raised by the petitioner.²⁰⁰

¹⁹⁴ *Id.* at 885.

¹⁹⁵ *Id.* at 887

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *In re All Operating Reactor Licensees*, 81 N.R.C. at 888.

¹⁹⁹ *Id.* at 887-88.

²⁰⁰ *Id.* at 888.

The NRC reached a similar conclusion with regard to the second request that the NRC order the shutdown of all operating GE Mark I reactors. Once more, the agency noted that actions taken after the Fukushima Dai-ichi accident already addressed the petitioners' concerns.²⁰¹ One such action was an order to all United States reactors that utilized the GE Mark I or Mark II containment design to install hardened vents capable of withstanding a severe accident.²⁰² This further enhanced "the reliability of the containment vent system, thereby protecting the containment during severe accidents."²⁰³ The agency observed that all licensees for Mark I or Mark II reactors had plans in place to comply with the order by June 30, 2019, or planned to shut down shortly thereafter.²⁰⁴ Thus, the agency again concluded that ongoing activities adequately addressed the underlying concern in the 2.206 petition.²⁰⁵

Regarding the third request, that the NRC inform international counterparts of defects in the Mark I design, the NRC again concluded that ongoing agency activities adequately addressed the petition.²⁰⁶ The agency observed that it had already engaged in several meetings with international organizations, including the Nuclear Energy Agency, the International Atomic Energy Agency, and the G8 Nuclear and Safety

²⁰¹ *Id.* at 889.

²⁰² *Id.* at 888-89.

²⁰³ *In re All Operating Reactor Licensees*, 81 N.R.C. at 889.

²⁰⁴ *Id.* at 885

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 890.

Security group, regarding the Fukushima Dai-ichi Accident.²⁰⁷ Thus, the agency declined to take further action.²⁰⁸

Last, the petition alleged that the NRC illegally extended operating reactor licenses for an additional twenty years through a misinterpretation of the Atomic Energy Act and endangered health and safety by ignoring reactor vessel embrittlement through neutron fluence during the twenty-year renewal period.²⁰⁹ The NRC rejected the argument that the agency lacked statutory authority to issue license renewals because the petitioner did not provide any supporting detail.²¹⁰ Finally, the agency disagreed with respect to reactor vessel embrittlement during the term of the renewed license because all applications for license renewal contained an analysis of the phenomenon, which the agency reviewed.²¹¹ Thus, the agency concluded that it had partially accepted and acted on the first two requests, because it had taken regulatory action following Fukushima, and rejected the second two requests.²¹²

Regarding the third metric, substantive outcomes, the NRC performed comparably to the EPA in Hammond and Markell's study. Hammond and Markell found that the EPA never withdrew state authority; likewise, the NRC never fully revoked an operating reactor license

²⁰⁷ *Id.*

²⁰⁸ All Operating Reactor Licensees, 81 N.R.C. at 890.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 891.

or issued a shutdown order over the period studied.²¹³ The NRC did explicitly granted part of the relief sought in ten of the forty one cases studied over the relevant period, just under a quarter of the time.²¹⁴ Like in DD-15-6, the NRC undertook other actions that addressed the underlying concern, either through investigations or information requests sent in response to the petition or through other ongoing agency processes, in thirty-two of the forty-one cases reviewed (i.e., approximately 78%

²¹³ Hammond & Markell, *supra* note 13, at 350. Professors Hammond and Markell noted that withdrawing state authority would be something of a “nuclear weapon” result, as it would have devastating consequences for the system of cooperative Federalism the EPA is supposed to administer. *Id.*

²¹⁴ Exelon Generation Co., LLC (Braidwood Nuclear Power Station, Units 1 & 2; Byron Nuclear Power Station, Units 1 & 2), DD-18-1, 87 N.R.C. 111, 118 (2018); Entergy Nuclear Operations, Inc., Entergy Nuclear FitzPatrick, LLC (James A. FitzPatrick Plant), DD-15-8, 82 N.R.C. 107 (2015); All Operating Reactor Licensees, DD-15-6, 81 N.R.C. at 891; Exelon Generation Co., LLC (Braidwood Nuclear Power Station, Units 1 & 2; Byron Nuclear Power Station, Units 1 & 2), DD-14-5, 80 N.R.C. 205, 219 (2014); Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, & Entergy Nuclear Indian Point 3, LLC (Indian Point Units 1, 2, & 3), DD-12-3, 76 N.R.C. 416, 424-25 (2012); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), DD-12-2, 76 N.R.C. 391, 409 (2012); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), DD-12-1, 75 N.R.C. 573, 599 (2012); Entergy Operations, Inc. (Vermont Yankee Nuclear Power Station) & Entergy Operations Inc. (River Bend Station, Unit 1), DD-11-7, 74 N.R.C. 787, 796 (2011); Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), DD-11-6, 74 N.R.C. 420, 425 (2011); Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), DD-11-1, 73 N.R.C. 7, 15 (2011).

of the time).²¹⁵ In contrast, the EPA granted some kind of substantive partial relief approximately 53% of the time.²¹⁶ Like the EPA, often the NRC's decisions yielded different outcomes than what the petitioner sought, but the agency action should not be discounted. Rather, further investigations and requests for information can act to confirm that facilities were operating safely or can lead to further corrective actions or analyses. Moreover, if ongoing agency processes adequately address a legitimate concern raised by a petitioner, then it would be inconsistent with the agency's mission for the agency to undertake further action. Consequently, it appears that the NRC generally provided petitioners with some form of relief or had already taken action to address the concern raised in about 75% of the cases studied.

Overall, the NRC performed strongly in the legitimacy metrics developed by Professors Hammond and Markell. The agency has seen significant, sustained use of the 2.206 process in recent years, has provided a high level of responsiveness to the claims raised, and has frequently provided at least partial relief.²¹⁷ Generally, the NRC's performance in these metrics was similar to the FCC's and EPA's performance.²¹⁸ As a result, it appears that the NRC's process for responding to 2.206 petitions provides further support for Professor Hammond and Markell's hypothesis that despite the absence of judicial review of petitions requesting enforcement or other agency action, agency processes for responding to such petitions carry a high level of internal legitimacy.

²¹⁵ The only cases in which the NRC completely denied relief were DD-13-1, DD-13-3, DD-14-1, DD-14-3, DD-15-3, DD-15-7, Rev., DD-17-03, DD-18-02, DD-18-03.

²¹⁶ Hammond & Markell, *supra* note 13, at 351-52.

²¹⁷ See *supra* notes 177, 193, 217 and accompanying text.

²¹⁸ Compare *id* with Hammond & Markell, *supra* note 13.

IV. Trends and Recommendations

The foregoing discussion illustrates the extent to which the FCC and the NRC fare on the metrics developed to assess inside out legitimacy. Professors Hammond and Markell concluded that the EPA's performance told "a promising story of agency legitimacy from the inside out."²¹⁹ The FCC's and NRC's responses to petitions for enforcement action from 2008-2018 tell a similarly promising story.

With respect to the first metric, frequency of use, both the NRC and FCC utilize processes for responding to public requests for enforcement action that have seen steady use over the past decade. As analyzed in the *Inside Out* article, EPA responded to a minimum of fifty-eight petitions over the course of 24 years; the NRC considered forty-two petitions in 10 years; and the FCC considered 119 informal and ninety-two formal petitions over the past 10 years.²²⁰ Thus, if anything the FCC's and NRC's avenues for requesting relief appear to have experienced greater traffic than the EPA's process. This sustained usage suggests that the public views pursuing these concerns regarding regulated entities through enforcement petitions as worthwhile.

The value the public appears to find in these processes suggests that other regulatory agencies should also consider adopting similar processes. Moreover, while a number of agencies have similar regulations, including the Federal Trade Commission, the National Labor Relations Board, the Surface Transportation Board, and the Securities Exchange Commission,²²¹ none of these agencies appear to publish decisions under these regulation on their websites or in commercial databases.

²¹⁹ See Hammond & Markell, *supra* note 13, at 364.

²²⁰ See *supra* notes 75-76, 113-15, 142-43 and accompanying text.

²²¹ 16 C.F.R. § 2.2 (2020); 29 C.F.R. § 101.4 (2020); 17 C.F.R. § 202.5 (2020).

Given the extent to which this article suggests that similar processes contain a high-level of internal legitimacy, proactively releasing these decisions may be a way for the above-mentioned agencies to build public confidence in agency decision making.

Finally, with respect to the first criterion, the FCC, unlike the EPA, frequently considered petitions that inappropriately sought relief under a different process or did not invoke a specific agency process at all.²²² As a result, in addition to providing the public with a chance to seek enforcement action, these processes also provide a type of escape valve or “off ramp” for petitions that do not cleanly fit into other avenues of relief. Other agencies may also find value in expansively interpreting such regulations to provide the public with more opportunities for involvement, particularly when those members experience difficulty identifying the correct avenues for involvement.

Regarding the second factor, responsiveness, both the FCC and the NRC performed similarly to the EPA in stating the incoming concern and providing some explanation for why the agency arrived at its conclusion. According to Hammond and Markell, the EPA provided reasoning based on legal standards and data nearly seventy percent of the time.²²³ Both the FCC and the NRC exceeded the ninety percent threshold for reasoned decision making, providing an even higher indicia of reliability.²²⁴

However, while the FCC and NRC generally provided full responses to petitions within their respective formal and informal processes, both agencies experienced some difficulties in responsiveness

²²² See *supra* notes 117-20 and accompanying text.

²²³ Hammond & Markell, *supra* note 13, at 348.

²²⁴ See *supra* notes 122-23; 148-150.

on the margins of these processes. As noted above, once a complaint landed within the scope of the section 1.41 process, the FCC frequently fully responded to the concerns. However, the question whether a petition should end up in the section 1.41 process appears to receive inconsistent treatment from the FCC. Sometimes, the FCC appears to conclude that claims the public could have raised through other agency processes are outside the scope of section 1.41, while other times the FCC has been willing to consider these claims within the scope of the process. Likewise, the NRC provides full responses to claims that screened into the section 2.206 process.²²⁵ But, the NRC at times provides less than full responses to comments submitted by petitioners on the draft decision.²²⁶ In light of these areas of weakness, agencies with processes for responding to public enforcement requests may consider instituting procedures to ensure that collateral decisions, such as whether to treat a claim within the scope of the process, receive a similar level of responsiveness as the claims that do make it into the process.

Finally, with respect to the third metric, both the NRC and the FCC performed similarly to the EPA. The FCC granted some form of relief in 38% of the informal petitions studied, while the NRC did so nearly 75% of the time.²²⁷ In contrast, the EPA initiated formal proceedings approximately 10% of the time and granted some form of relief in approximately 53% of the cases studied by Hammond and Markell.²²⁸ Again, the NRC and FCC performed similarly to the EPA, which once more suggests that the agency petition processes possess a high degree of internal reliability.

²²⁵ See *supra* note 193 and accompanying text.

²²⁶ See *supra* note 150 and accompanying text.

²²⁷ Hammond & Markell, *supra* note 13, at 350-51.

²²⁸ *Id.*

One notable feature of the NRC and EPA processes is that while petitioners often sought dramatic forms of relief, such as revocation of state authority or reactor shut down, these “nuclear option” types of relief were never achieved.²²⁹ As Hammond and Markell explain, these types of outcomes would have significant impacts and implications for the regulated entities and would be indicative of a finding that “performance is so bad that salvaging the partnership is beyond the realm of possibility.”²³⁰ Thus, it is unsurprising that such relief is rarely granted. Nonetheless, the EPA, FCC, and NRC did frequently grant more modest forms of relief. Therefore, members of the public engaging in the petition may consider seeking relief more tailored to their grievances, which may be more likely to influence the agency and ultimately impact the regulated entities’ behavior.

V. Conclusion

Administrative agencies are the powerful “fourth branch” of our federal government.²³¹ Many are understandably leery of agencies’ considerable powers. Agencies are not explicitly provided for in the constitution,²³² and yet they have the combined powers of the other three

²²⁹ *Id.*

²³⁰ *Id.* at 350.

²³¹ *See supra* notes 6 and 11.

²³² The Constitution does not provide for agencies as a separate branch of government. Instead, agencies can be traced to Article 1 Section 1 of the Constitution which reads: “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” The “necessary-and-proper” clause in the eighth section of the Article 1 states that the Congress shall have power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers ... in any Department or Officer thereof.”

branches of government. Agencies make, apply, and enforce rules that dictate almost every aspect of our life, right down to how we eat, drink, and breathe.²³³ Some find this type of centralized power undemocratic,²³⁴ and question the legitimacy of the administrative state. However, in most cases, the judicial branch's review of agency action serves as a check on the administrative state.

This article examined a set of agency actions the judicial branch cannot review and considered whether agencies' actions provided an inside-out type of legitimacy when applying the Hammond and Markell metrics. This article concludes that agencies have processes in place that provide internal checks on themselves even when the judicial branch is not reviewing their actions. This serves several purposes, including legitimizing the administrative state and benefitting the public by ensuring a more informed and reasoned agency action.

Hammond and Markell advance several theories for why agency decisions may carry high indicia of reliability even when there is no judicial review to act as a check: agency professionalism, proximity to their constituencies in regional offices, a fire-alarm tool, or the presence of a nuclear option.²³⁵ But, unlike the EPA, the NRC primary decision maker in section 2.206 proceedings works from the agency headquarters, which suggests that proximity alone may not account for inside-out legitimacy. Similarly, unlike the EPA, the FCC informal procedures do not rely on a "nuclear option" that results in a dramatic regulatory action. Correspondingly, such modest regulatory actions would in turn be

²³³ *Supra* notes 3 and 4.

²³⁴ KEVIN B. SMITH & MICHAEL J. LICARI, PUBLIC ADMINISTRATIONS: POWER AND POLITICS IN THE FOURTH BRANCH OF GOVERNMENT (2006). *See also supra* note 5.

²³⁵ Hammond & Markell, *supra* note 13, at 354-59.

unlikely to result in a “fire alarm” type of oversight from elected officials. Consequently, agency professionalism may ultimately be the best explanation for unexpected inside-out legitimacy in areas lacking judicial review. In other words, perhaps agencies have heeded John Wooden’s lesson; character is based on what you do when no one is watching.