FCC PROCESS REFORM

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

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C O N T E N T S

FCC PROCESS REFORM

FRIDAY, MAY 13, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:32 a.m., in room 2123, Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Present: Representatives Walden, Terry, Stearns, Shimkus, Blackburn, Bilbray, Bass, Gingrey, Scalise, Latta, Kinzinger, Barton, Eshoo, Markey, Doyle, Matsui, Christensen, Dingell (ex officio), and Waxman (ex officio).

Staff Present: Gary Andres, Staff Director; Ray Baum, Senior Policy Advisor/Director of Coalitions; Allison Busbee, Legislative Clerk; Stacy Cline, Counsel, Oversight; Neil Fried, Chief Counsel, C&T; Debbee Keller, Press Secretary; David Redl, Counsel, Telecom; Roger Sherman, Minority Chief Counsel; Phil Barnett, Minority Staff Director; Shawn Chang, Minority Counsel; Jeff Cohen, Minority Counsel; and Sarah Fisher, Minority Policy Analyst.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. I welcome the FCC Chairman and Commissioners to our hearing today, and thank you for your thoughtful testimony and the time you each took to meet individually with me to discuss process reform ideas that could improve the transparency and accountability of the FCC. As I told the Chairman and each Commissioner, and as Ms. Eshoo and I discussed and agreed yesterday, a discussion about reforming process is not, and should not become, an exercise in partisanship, or serve as a cloak to attack past or present commissions or chairmen.

As I am sure all will notice, only four witness chairs are occupied in light of Commissioner Baker's announcement Wednesday. I would like to thank her for her many years of public service not only as a Commissioner, but also in helping us complete the DTV transition while she was heading up the NTIA. I wish her well in her new endeavor.

Turning to today's topic, it is our responsibility to review how independent agencies to whom we have delegated authority and over which we have jurisdiction conduct the public's business. At times the FCC succumbed to practices under both Democratic and Republican chairmen that weaken decisionmaking and jeopardize

public confidence. While Chairman Genachowski and some of his predecessors have taken steps to improve process, we have all witnessed how process and procedures of one Chairman can change dramatically under another. One FCC is open and transparent, and the next is closed and dysfunctional. The time is ripe to codify best practices to ensure consistency from issue to issue and Commission to Commission.

Many of my colleagues on this subcommittee have worked on reform ideas in the past, and some have proposed changes in bill form. We will consider those as well. To kick things off, here are seven items to think about:

First, the FCC could be required to start new rulemaking proceedings with a notice of inquiry rather than a notice of proposed rulemaking. An NPRM presumes regulation is needed. The FCC should first examine the state of the relevant markets, services, and technologies. Even when regulation may be appropriate, the FCC is unlikely to craft as useful a proposal without first gathering preliminary information.

Second, the FCC does not always publish the text of proposed rules for public comment before adopting final rules. Providing specific text will allow for more constructive input and a better end product. Crafting proposed rules should not be difficult if there is a genuine need and the FCC has started with an NOI.

Third, finite timelines for resolution of matters would be helpful. Parties and the public should have some sense of when resolution will come.

Fourth, the FCC now makes information available about which draft items are circulating before the Commissioners. The FCC could be required to provide additional information, such as a list of all unfinished items at the Commission, the date the items were initiated, their current status, and expected date of completion.

Fifth, a bipartisan majority of Commissioners other than the Chairman could be allowed to initiate items to prevent a Chairman from stopping consensus items.

Sixth, the President's Memorandum for the Heads of Executive Departments and Agencies, "Regulatory Flexibility, Small Business, and Job Creation," requires executive agencies to conduct cost-benefit analyses before adopting regulations. The memorandum does not apply, however, to independent agencies like the FCC. We could remedy that by requiring the FCC to identify actual consumer harm and conduct economic, market and cost-benefit analyses before adopting any regulation.

Seventh, the FCC's transaction review standards are vague and susceptible to abuse. Parties with a pending transaction should not feel pressure to accept "voluntary" conditions on the deal or to curtail their advocacy in other proceedings. These concerns are neither new nor of concern to only one party. Indeed, my good friend from Michigan, Chairman Emeritus Dingell, observed in a March 2000 hearing that there is "great need to address and to reform the way the FCC handles its merger reviews. These are a remarkable exercise in arrogance, and the behavior of the Commission, oft-times by reason of delay and other matters, approaches what might well be defined as not just arrogance, but extortion." The concerns Mr. Din-

gell raised then have been borne out with increasing frequency over the last decade.

To address this, the FCC could be prohibited from adopting any conditions unless they are narrowly tailored to any transaction's specific harm. To prevent the FCC from using transactions to commence industrywide changes it could not otherwise adopt, the FCC could be required to show statutory authority for the conditions outside the transaction review provisions of the act.

These suggestions are simply meant as conversation starters. I look forward to additional suggestions from my colleagues or the Commissioners themselves.

[The prepared statement of Mr. Walden follows:]

Statement of the Honorable Greg Walden

Chairman, Subcommittee on Communications and Technology

Hearing on FCC Process Reform

May 13, 2011

I welcome the FCC Chairman and commissioners to our hearing today and thank you for your thoughtful testimony and the time you each took to meet individually with me to discuss process reform ideas that could improve the transparency and accountability of the FCC. As I told the Chairman and each commissioner, and as Ms. Eshoo and I discussed and agreed yesterday, a discussion about reforming process is not, and should not become, an exercise in partisanship, or serve as a cloak to attack past or present commissions or chairmen.

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making and jeopardize public confidence. While Chairman Genachowski and some of his predecessors have taken steps to improve process, we've all witnessed how process and procedures of one chairman can change dramatically under another. One FCC is open and transparent and the next is closed and dysfunctional. The time is ripe to codify best practices to ensure consistency from issue to issue, and commission to commission.

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These suggestions are simply meant as conversation starters. I look forward to additional suggestions from my colleagues or the commissioners themselves.

On that note, I yield my remaining time to Chairman Emeritus Barton.

Mr. WALDEN. And on that note, I yield back the balance of my time and would recognize the ranking member on the subcommittee, Ms. Eshoo from California.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman, and good morning to you. And welcome to Chairman Genachowski and the members of the Federal Communications Commission. It is good to see you. Today's hearing is an important opportunity to hear from the FCC Chairman and the Commissioners on what is already working well, because there are things that are working well, and where there are opportunities to improve the Federal Communications Commission. We should work together as a committee to subject ideas and suggestions to healthy scrutiny and determine what reforms can be embraced to better serve the public good. That is why we are all here, and I think sometimes that gets lost in the complexity and the layers of things. We are here to serve the public good.

Under Chairman Genachowski's tenure, the Commission has taken several key steps to increase openness, transparency, and greater interaction with the public. The Spectrum Dashboard, the new ex parte rules, the growing use of social media like Twitter and Facebook are just a few ways that the FCC has become more responsive to the needs of consumers and businesses. But there is always much more that can be done, and I welcome steps that will ensure that the Commission can operate as a modern, 21st-century Federal agency.

Earlier this year I introduced the FCC Collaboration Act with our colleagues Representatives Shimkus and Doyle. This is a simple bipartisan reform measure which would modify the current rules which prohibit more than two Commissioners from talking to each other outside of an official public meeting. Now, why is this important? In an agency that deals with the highly technical issues like spectrum and universal service, FCC Commissioners should be able to collaborate and benefit from the years of experience that each one brings to the table. We should move this bill forward in a timely manner and get it done.

I welcome examining other ideas as well, like the FCC Commissioners' Technical Resource Enhancement Act, a bill introduced in the last Congress that would allow each Commissioner to appoint an electrical engineer or a computer scientist to their staff. Similar to the Collaboration Act, I am open to looking at other ways to ensure that each Commissioner is equipped to evaluate the complex technology and telecommunications issues that the FCC is faced with today.

What would concern me would be proposals which diminish the Commission's ability to protect the public interest and to preserve competition in the telecommunications marketplace. The FCC has a critical role to play in evaluating proposed mergers, ensuring that broadband is universally deployed, and that the market for voice and data service is actually competitive.

To stay in touch with a rapidly changing industry, the FCC, I think, should make it part of its core mission to visit companies

both small and large. Last month Commissioner Copps joined me in my congressional district, and we visited several companies headquartered in Silicon Valley. We learned a great deal. I extend a similar invitation to each Commissioner because I believe these types of meetings with entrepreneurs, engineers, and other technology experts are central to understanding the issues you work on every day.

So thank you again for being here today. I really look forward to this hearing, and I also look forward to hearing your testimony and your fresh thinking.

I yield back the balance of my time.

[The prepared statement of Ms. Eshoo follows:]

Statement of Representative Anna G. Eshoo
Subcommittee on Communications and Technology
House Committee on Energy and Commerce
"FCC Process Reform"
2123 Rayburn House Office Building
May 13, 2011

Good morning and welcome Members of the Commission.

Today's hearing is an opportunity to hear from the FCC Chairman and Commissioners on what is already working well and where there are opportunities to improve the Federal Communications Commission (FCC). I believe we should work together as a Committee to subject ideas and suggestions to healthy scrutiny and determine what reforms can be embraced to better serve the public good.

Under Chairman Genachowski's tenure, the Commission has taken several key steps to increase openness, transparency and greater interaction with the public. The Spectrum Dashboard, new *ex parte* rules, and growing use of social media like Twitter and Facebook, are just a few ways the FCC has become more responsive to the needs of consumers and businesses. There's always much more to be done and I welcome steps that will ensure that the Commission can operate as a modern, 21st century federal agency.

Earlier this year, I introduced the *FCC Collaboration Act* with our colleagues Reps. Shimkus and Doyle. This simple, bipartisan reform measure would modify current rules which prohibit more than two Commissioners from talking to each other outside of an official public meeting.

Why is this important? In an agency which deals with highly technical issues like spectrum and universal service, FCC Commissioners should be able to collaborate and benefit from the years of experience that each brings to the table. We should move forward with this bill in a timely manner and do so independent of any partisan measures that would prevent us from seeing this through to final passage.

I welcome examining other ideas as well, like the *FCC Commissioners' Technical Resource Enhancement Act*, a bill introduced last Congress that would allow each Commissioner to appoint an electrical engineer or computer scientist to their staff. Similar to the Collaboration Act, I'm open to looking at other ways to ensure that each Commissioner is equipped to evaluate the complex technology and telecommunications issues that the FCC is faced with today.

What would concern me would be proposals which diminish the Commission's ability to protect the public interest and preserve competition in the telecommunications marketplace. The FCC has a critical role to play in evaluating proposed mergers, ensuring that broadband is universally deployed, and that the market for voice and data service is competitive.

To stay in touch with a rapidly changing industry, the FCC should make it part of their core mission to visit the companies, both small and large, that are focused on developing innovative new technologies. Last month, Commissioner Copps joined me in visiting several companies headquartered in Silicon Valley. I extend a similar invitation to each Member of the

Commission, because I believe these types of meetings with entrepreneurs, engineers and other technology experts, are central to understanding the issues you work on each and every day.

Thank you again for being here this morning and I look forward to hearing your testimony and fresh thinking.

Mr. WALDEN. Now we are going to recess for about an hour. We think it could take upwards of an hour, so why don't we plan to just reconvene at 10:40. And with that, we stand in recess.

[Recess.]

Mr. WALDEN. I want to thank my colleague from Illinois for his courtesy in yielding to Mr. Waxman, who has another engagement at 11:30. So we will go out of our normal sequence.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you, Mr. Chairman. I particularly want to thank Mr. Shimkus for his courtesy.

I would like to welcome Chairman Genachowski as well as Commissioners Copps, McDowell, and Clyburn back to the Subcommittee on Communications and Technology. We understand how much effort goes into preparing to testify before Congress, and we greatly appreciate your participation.

The topic of FCC reform is not new to this committee. As one reporter's account of an October 28, 1999, hearing recalls, quote, "The FCC was criticized for its slow pace of institutional reform, its handling of the e-rate and universal service, its exercise of antitrust merger review authority, its delay in completing antitrust merger reviews, and its imposition of conditions on mergers," end quote. Well, today's hearing will take us back to the future as we revisit many of these same issues.

At the outset, let me say Chairman Genachowski should be commended for his significant efforts and commitment to improving agency operations and boosting employee morale. Since he became Chairman, the agency has increased transparency, expanded opportunities for public input, and improved information sharing with other Commissioners and the public.

The agency now includes more details on proposed rules in notices of proposed rulemaking, makes adopted rules available to the public more quickly, and has revamped its ex parte rules to enhance openness and transparency. These efforts have been made better by the thoughtful bipartisan suggestion of his fellow Commissioners.

And it is clear that today the FCC is a much better place to work. According to the 2010 OPM employee survey, the FCC was the most improved agency in the Federal Government.

I also want to commend subcommittee Chairman Walden for looking at this issue in a nonpartisan manner. He has sought input from all of the Commissioners and Republican and Democratic committee members, and he is committed to explore proposed process reforms in detail before we proceed toward possible legislation.

If the committee does develop legislation regarding FCC reform, we should be guided by a few basic questions about each proposed change to ensure that we are promoting smart regulation.

First, does a proposed change create an undue burden on the FCC? When we impose statutory requirements of any kind, we need to be wary of burdening the agency with compliance requirements.

Second, are we undermining agency flexibility to act quickly and efficiently in the public interest? If we put prescriptive process requirements in statute, we could end up promoting slower, not faster, decisionmaking.

And third, are we requiring additional process for valid reasons? We must not impose procedural hurdles for their own sake.

Fourth, are we making procedural changes in an attempt to address outcomes with which we don't agree? For example, if we limit the ability of the agency to negotiate voluntary commitments related to mergers, are we also willing to accept that certain mergers may then be rejected outright? Some might view conditions as unfair, while others might see them as critical tradeoffs that allow transactions that might otherwise fail to go forward.

And finally, why the FCC? Are we imposing process reforms on the FCC that should apply to all Federal agencies? If not, what is our basis for treating the FCC differently?

I look forward to hearing our panel address these issues and to receiving their advice about how to improve the FCC. I look forward to working with you, Mr. Chairman, and I yield back. Any other Members wish me to yield to them? If not, I yield back the balance of my time.

Mr. WALDEN. I thank the gentleman for his kind comments and look forward to continuing our discussion on these matters, and I appreciate your comments on the principles.

I am now going to yield. We have 5 minutes on our side. We have several speakers, so if we could kind of work a minute apiece or not much over that. So at this time I would start with Mr. Stearns and recognize him.

Mr. STEARNS. Thank you, Mr. Chairman. I thank you for this hearing. I think the ranking member, Mr. Waxman, has pointed out that it is—the agency has come a long way. I think it has, but in this area of Internet technology, I think there is still a long way to go forward. And I think there is a litany of necessary improvements, and I think this hearing will show that.

For example, the merger review process, I think, needs to be examined. Although the FCC internal shot clock to act on mergers is 6 months, XM/Sirius took over 16 months, Mr. Chairman, and Comcast/NBCU took nearly 11. So I think in a rapidly evolving market here, uncertainty can sometimes create havoc for markets, and deadlines for FCC action coupled with ensuring merger reviews are handled in a transparent way is important without endless strands of nonmerger-specific conditions attached, I think, would provide future certainty.

So the bottom line, I think the agency could improve, and I hope we can move forward.

Thank you.

Mr. WALDEN. I now recognize the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

First of all, we want to thank Commissioner Baker for her time, and hopefully we can expeditiously get her replaced in the Commission. I know that is everyone's desire.

Chairman, we appreciate the movement on reform. It is something that with the new technology, new age that is important, and we know there are steps being made in that direction.

And I have enjoyed my time working with Commissioner Copps and, of course, Anna Eshoo. And on the sunshine bill, it just doesn't make sense. Maybe three can't speak together, but to have two not be able to speak of the Commissioners—Chairman Walden and I spoke on the floor. I think it is something that we can move expeditiously. Of course, I am not the Chairman, so I will defer to his wisdom and guidance, but based upon the last election, even in the cycle I said, I think the public is tired of comprehensive, big bills. We ought to move things that we can move clearly, concisely and defend, and maybe we will be there at the end if other things can't be agreed upon. But I have been—the Chairman has agreed to take a look at what we are doing and hopefully merge those with the other things that are not also in agreement and produce a good bill.

So with that I thank him, and I will probably ask some questions on that if I am not on a plane. And I yield back.

Mr. WALDEN. I recognize the gentlelady from Tennessee, Mrs. Blackburn.

Mrs. BLACKBURN. Thank you, Mr. Chairman, and welcome to all of you.

Procedurally I do have some questions about license transfers, indecency complaints, and FCC voting procedures. But I think the biggest problem that I have and what I want to discuss with you today is what I see is your overreach, going beyond your statutory authority, and you do it without consequence.

And the Chairman and I have discussed our disagreement on net neutrality and regulation of the Internet, but I think there is also overreach to other things like data roaming and agencies scheming, which I think is a clever scheme, to socialize our mobile networks. And I think that as you look at privacy, and we will talk about this a little bit today, that the FCC is moving into areas where it should not be with issues like privacy.

So I am one of those that think it is time to maybe rein the agency in a little bit and have a discussion about what your structure should look like. So thank you for being here to participate.

I yield back.

Mr. WALDEN. Mr. Bass or Mr. Gingrey, do you have any comments?

Mr. BASS. If I could make a brief comment.

I want to thank all four of you for being here today. And I am not sure whether I am going to be able to stay long enough to ask the question, but I was hoping that the Chairman would comment on this GPS, slash—you know, the spectrum issue, as to whether or not it would be appropriate for that decision to be one that the Commission itself makes rather than be done through rule. There are significant potential issues associated with this which need to be aired, and I am hopeful that the Commission will have a process that will allow for both sides in this debate to have their views considered and assure that a proper decision is made by the Commission.

Thank you, Mr. Chairman.

Mr. WALDEN. The gentleman yields back the time. All time on our side of the aisle has been yielded back. Same on the other.

So with that, I would like to welcome the Chairman of the Federal Communications Commission, Mr. Genachowski. We appreciate your testimony and your work at reform, and we welcome your comments this morning, sir. Thank you.

STATEMENT OF JULIUS GENACHOWSKI, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; MICHAEL COPPS, PH.D., COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; ROBERT MCDOWELL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; AND MIGNON CLYBURN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF JULIUS GENACHOWSKI

Mr. GENACHOWSKI. Thank you, Chairman Walden, Ranking Member Eshoo, members of the committee. Thank you for holding this hearing on FCC process reform.

At the FCC we are focused on harnessing the power of communications technology to benefit all Americans, grow our economy, create jobs, enhance our competitiveness, and unleash innovation.

On my first day as Chairman, I told the FCC staff that whether we can achieve these goals depends on how our agency works. That is why the FCC's processes and operations are important, as Chairman Walden has said, and that is why I have made it a priority to improve the way the FCC does business.

Our approach to reform rests on a number of core principles: efficiency and fiscal responsibility; accountability and transparency; reliance on facts and data, on the power of technology to improve agency operations, and on the benefits of collaboration.

To drive our reform efforts, I appointed a Special Counsel on FCC Reform immediately after my confirmation, and I hired a new Managing Director with experience running a multibillion-dollar private-sector PNL to help lead our reform efforts.

My fellow Commissioners have been vital partners in this effort. Commissioner Copps made FCC reform a priority when he was acting Chairman. Commissioner McDowell has raised issues with me on which we have taken positive action, and Commissioner Clyburn has taken a lead and has helped us make real progress on our process and relationships with the States.

In the past 2 years working together we have increased efficiency, increased transparency, increased collaboration, and increased the effectiveness of the FCC. I am proud of our progress, and I am pleased that in the past 2 years, 95 percent of the Commission's actions have been unanimous and bipartisan.

My written testimony includes many examples of the reforms implemented in the last 2 years. As John Wooden said, We shouldn't confuse activity with accomplishment, so I would like to use my limited time to highlight some of the real results of our reform efforts.

In the last 2 years, we have reduced the time between the vote on a Commission decision and its public release from an average of 14 days to 3 days, and to 1 day in most cases. We have increased the number of notices of proposed rulemakings that publish the

text of proposed rules from 38 percent to 85 percent. We have eliminated many outdated regulations. Two months ago we identified 20 sets of unnecessary data-collection requirements to be eliminated, and just yesterday the Commission identified and eliminated an additional 5 data requirements.

We have acted on over 95 percent of transactions within the 180-day shot clock period. With respect to major transactions, we have cut down the review time by more than 100 days. We have reduced our broadcast application backlog by 30 percent and our satellite application backlog by 89 percent. We have broken down internal silos at the FCC and increased internal communications. We have reformed our video relay service, a reform that has already saved taxpayers about $250 million. We are saving millions of dollars by harnessing technology to improve the agency's operations including by consolidating multiple licensing systems and reducing data centers.

A leading commentator said the Commission has gone from one of the worst to one of the best in its use of online tools to serve the public and all stakeholders. Just yesterday we relaunched FCC.GOV after receiving and responding to broad input on our beta launch. We have launched a public Spectrum Dashboard. A few weeks ago we had the first joint blog post in FCC history with all FCC Commissioners focusing on the importance of reforming the Universal Service Fund.

We have held more than 85 public forums with active participation from Commissioners, and for the first time have made staff-led public workshops a routine part of Commission work. We have adopted reforms of our ex parte process to increase transparency, reforms of our voting process to increase efficiency, and reforms of our filing process to increase effectiveness.

Our National Broadband Plan has been lauded as "a model for other nations" and has been praised for its process and its substance.

OPM's governmentwide survey of Federal employees identified the FCC as the most improved place to work in the Federal Government. I thank Mr. Waxman for mentioning that. And just last week the FCC team that worked on the National Broadband Plan was nominated for a Service to America Medal, the most prestigious independent award for America's civil servants.

I am proud of what we have achieved. The Commission is working effectively. We are moving in the right direction. And I thank my fellow Commissioners, as well as the FCC's employees, who have been instrumental in making this possible, as well as the many members of this committee who have over the years and in my time offered very constructive suggestions to improve our processes.

Of course, there is more we can do to improve performance, and I am committed to continuing our efforts at reform. Making the FCC work is important because the FCC's mission is important. It matters to our economy, to our global competitiveness, and to the quality of life of all Americans.

I look forward to working with the subcommittee on these important issues. I thank you, and I look forward to your questions.

Mr. WALDEN. Thank you, Chairman, we appreciate it.

[The prepared statement of Mr. Genachowski follows:]

Statement of Chairman Julius Genachowski

Federal Communications Commission

Hearing on "FCC Process Reform"

Before the Subcommittee on Communications and Technology

Committee on Energy and Commerce

U.S. House of Representatives

May 13, 2011

Thank you, Chairman Walden, Ranking Member Eshoo, and other members of the subcommittee for this opportunity to testify on the topic of FCC process reform.

At the FCC, we are focused on harnessing the power of communications technology to grow our economy, create jobs, enhance U.S. competitiveness, and unleash innovation in areas like education, health care, and public safety.

On my first day as Chairman, I told the FCC staff that *whether* we can achieve these goals depends on *how* our agency works.

That is why the FCC's processes and operations are so important, and it's why I have made it a priority to improve the way the FCC does business.

Our approach to reform rests on a number of core principles: efficiency and fiscal responsibility; accountability and transparency; reliance on facts and data, on the power of technology to improve agency operations, and on the benefits of collaboration. To drive our reform efforts, I appointed a Special Counsel for FCC Reform immediately after my confirmation. I also hired a new Managing Director with experience running a multi-billion dollar private enterprise to help lead our reform efforts.

My fellow Commissioners have been vital partners in this effort. As Acting Chairman, Commissioner Copps took important steps to open up the agency;

Commissioner McDowell has made valuable suggestions on which we have taken action, and Commissioner Clyburn has taken the lead and has helped us make real progress on our relationships with the states.

In the past two years, working together, we've increased efficiency, increased transparency, increased collaboration, and increased the effectiveness of the FCC.

In the past two years, 95 percent of Commission actions have been bipartisan.

Our goal is to make the FCC a model for excellence in government, and I am proud of our progress toward that objective.

Others agree. A leading commentator said the Commission has gone "from one of the worst ... to one of the best" in its use of online tools to serve the public and all stakeholders. Our National Broadband Plan has been lauded as "a model for other nations," and has been praised for its process as well as substance. Just last week, the FCC team that worked on the Plan was nominated for a Service to America Medal, the most prestigious independent award for America's civil servants.

Our overall reform agenda has focused on five key areas, and in each area we've had considerable success.

First, we've substantially improved the agency's rulemaking process.

During my tenure, we've significantly increased the number of Notices of Proposed Rulemakings (NPRMs) that contained the text of proposed rules from 38% to 85%. This is a best practice that we set out early to achieve.

It is also a best practice to release Commission orders promptly upon adoption. To this end, we have significantly reduced the time between the vote on a Commission decision and its release. Previously, the average release time was 14 days after vote. We've lowered that number to 3 days, with a majority released within 1 day.

We've also ensured that comment periods strike a healthy balance between expeditious decision-making and full stakeholder input.

And to increase the transparency of agency decision-making, we've reformed our ex parte rules to improve the information all interested parties

receive and to produce a better record for Commission decision-making. For example, we have changed our rules to require parties to file a summary of *all* ex parte presentations, as opposed to the prior standard of just presentations that contained arguments not already in that person's filings.

In past years, each of these areas has led to some criticism of FCC processes. This Commission has listened, and has taken substantial steps to improve our rulemaking process.

A second important area of reform is relieving burdens on industry and other stakeholders.

This Commission has eliminated 49 outdated regulations. That is far more than new rules issued.

Earlier this year, we identified 20 sets of data collections from industry that are no longer necessary and are moving to eliminate them. In addition to those 20, we approved a measure yesterday to begin the process of eliminating more than 5 unnecessary data collections on international communications; to reduce reporting requirements in those studies that remain; and to exempt hundreds of small businesses from having to report.

These efforts are part of a broader Data Innovation Initiative, which also established the position of FCC Chief Data Officer, who is charged with ensuring that the Commission is efficiently collecting and utilizing data – making sure a fact-based and data-driven agency collects the information it needs, but no more than what it needs.

We continue to work on creating a Consolidated Licensing System. The FCC currently has 10 licensing systems, which perform similar functions but are managed separately by each bureau and office and operate on different platforms. This creates inefficiency inside the agency and outside, and we have been developing a consolidated system would provide a single portal of access to all of the FCC's licensing systems.

We have made it easier for radio stations to certify compliance with our technical rules by better utilizing information submitted and accepted in earlier applications.

This approach of removing barriers is consistent with our broader policy objectives.

In December, we launched a comprehensive review of our current telecommunications regulations, seeking public comment on which regulations are no longer necessary or in the public interest.

Our Broadband Acceleration Initiative is identifying ways to reduce barriers to broadband infrastructure deployment – speeding build-out and reducing costs. One action we have already taken is establishing a shot-clock for the approval process for towers and antennas necessary for mobile communications – speeding up the process for wireless carriers and saving them money so they can more quickly deploy services like 4G mobile broadband.

In a number of important instances, we have modified our rules to make them less burdensome and increase flexibility. For example, we have eliminated unnecessary restrictions on the use of certain spectrum bands. And we have proposed an innovative, market-based approach to freeing-up new spectrum needed for mobile broadband – an initiative that has received support from associations representing thousands of companies, as well as from over 100 leading economists on a bipartisan basis.

We have also focused on analyzing costs and benefits in our decision, and I have instructed Commission staff to perform their responsibilities consistent with the recent Presidential Memorandum on regulatory flexibility, small businesses, and job creation.

Our third area of focus has been improving the Commission's engagement with outside stakeholders, significantly improving both the information we provide the public, and also the opportunities for receiving input from the public.

In doing so, we have focused on harnessing the power of communications technology to improve both communications and interaction between the agency and the public. Our goal has been to be a government leader in these efforts.

For the first time in over a decade, we have updated – in fact, transformed – the FCC's website. The new site – which officially launched yesterday --

promotes broad public engagement through plain language, transparency, and tools to make it easier for all stakeholders – including consumers, researchers and businesses -- to find what they need. One leading technology website described the new FCC.GOV as a "miraculous makeover." Another called it a "model for other agencies," adding that "the bar has been raised for federal government websites."

To solicit ideas on FCC reform itself, the FCC launched an internal and external version of Reboot.FCC.gov where FCC employees and the public have been able to submit their ideas for improving and reforming the agency.

We have used modern communications tools – from blogs to crowdsourcing -- with a focus on enabling broad interaction with the agency. This started by launching the first blog in FCC history, and, indeed, a few weeks ago, we had the first *joint* blog post from all five Commissioners, focusing on the importance of Universal Service Fund reform.

For the first time, we have made it standard practice to live-stream all public workshops and meetings.

We developed new tools -- like a broadband speed test that lets people know how fast their wired or wireless Internet connections actually are. More than 2 million people have taken the test.

In conjunction with NTIA, we developed the nation's first National Broadband map, which identifies what services and what speeds are available in each community – information that is useful to consumers, policy makers, as well businesses and entrepreneurs.

The FCC is also the first federal agency to launch a website that makes government data available in formats that can help entrepreneurs build innovative applications, including making all of our APIs available for developers.

As part of the agency's baseline spectrum inventory, we created our Spectrum Dashboard and FCC's LicenseView. The Spectrum Dashboard identifies how non-federal spectrum is currently being used, who holds spectrum licenses, and where spectrum is available. LicenseView is a comprehensive online portal to information about each spectrum license; it presents data from multiple FCC systems in a searchable, user-friendly manner.

Input from the public is at least as important as information provided to the public. And we have taken a number of significant steps to enhance the input we receive from outside stakeholders.

We've relied extensively on open staff-led public workshops, which were seldom used by previous Commissions. These are opportunities for stakeholders to engage directly with staff on identifying and solving major issues of importance.

The Commission has hosted more than 85 public forums – staff-led workshops as well as Commission-level hearings – since I became Chairman, on topics ranging from public safety to small business opportunities to auction processes. Last month, all five Commissioners participated in the first in a series of workshops on reforming the Universal Service Fund, and we recently hosted a productive public forum on reducing barriers to broadband buildout. All of these events have been streamed online, allowing people anywhere to participate and submit their comments, questions, and ideas.

We have also used technology to expand the universe of participants in FCC proceedings.

The FCC was the first agency in government to include in the official public record comments received online. Over 60,000 comments have been received through these non-traditional avenues. Our new website takes this innovation to the next level. We now have an easy-to-use proceedings page where people can submit comments into the public record with just one click.

Another way we are maximizing input from outside experts is by reinvigorating external advisory committees. Last month, our Technology Advisory Committee, which is comprised primarily of engineers and experts from the business community, issued a series of thoughtful and important policy recommendations aimed at boosting job creation and enhancing U.S. competitiveness.

The fourth area is improvement in the FCC's administration of programs, with a focus on ensuring efficiency, accountability and fiscal responsibility.

For example, our Video Relay Service program, which provides vital communications for people who are deaf or hard-of-hearing, suffered from

serious fraud and abuse. We have instituted reforms to this program that have already saved taxpayers approximately $250 million.

We have also made modernizing and streamlining the outdated and inefficient Universal Service Fund one of the agency's highest priorities. A reformed USF will eliminate waste and deliver targeted resources where they are needed most to ensure that all Americans have access to broadband services.

We are moving to reform the High Cost Fund portions of the USF, as well as the Lifeline/Link-Up program, focused on ensuring that every dollar spent in all programs goes directly and efficiently to serve the programs purposes.

We've also modernized our E-rate program, simplifying the forms schools and libraries fill out for funding for computer equipment, and also offering participants greater flexibility, so they can get faster Internet connections, access 21st century learning tools, and better serve their broader communities.

Fifth and finally, we are focused on improvements to FCC internal processes and operations.

That work begins with staff of the FCC.

We are fortunate to have a core of expert talent that is the envy of every other telecommunications agency in the world.

Given the ongoing changes in technology and the growing importance of this sector, we need to continue upgrading our workforce for the digital age.

So we have focused on ensuring that we have a sufficient number of engineers, technologists, economists, and econometricians with the skills to tackle the challenges of the digital age. Their skills are essential as the Commission increasingly addresses complex matters like dynamic spectrum sharing, spectrum reallocation, and public safety in a digital age. And all of these employees have the experience and knowledge to support the Commission's complex and unprecedented data-driven and fact-based efforts to achieve our country's broadband goals.

To help our staff be more effective, we have made it a priority to tear down silos that in the past have kept them apart – a problem that was emphasized

by the Government Accountability Office reviewing agency operations between August 2008 and October 2009. Collaboration has been proven to be a key ingredient of new innovations and new ideas, so we have created a number of inter-bureau task forces on topics ranging from spectrum to consumer issues to diversity.

Beyond those task forces, we are encouraging a culture of collaboration at the agency, and seeing it emerge. Indeed, most of the presentations to the Commissioners at our monthly public meetings involve multiple bureaus.

To increase collaboration not only across the agency, but across the federal government, we created the Emergency Response Interoperability Center, which, in consultation with federal partners like the Department of Homeland Security, the Department of Justice, NIST and NTIA, is setting the standard for a nationwide, interoperable, wireless broadband network for public safety.

We have also focused on harnessing technology to improve agency operations. In addition to consolidating the Commission's 10 licensing system into a single database, which will save millions of dollars each year, we also propose reducing the number of the FCC's data centers, which we project would save $1.3 million annually.

We are also committed to clearing out backlogs.

Despite the fact that we are at the lowest FCC staffing level in 10 years, we have made significant progress in reducing the number of backlogged applications.

In particular, we've reduced the number of pending broadcast applications by 30% and the number of satellite applications by 89%.

The bottom line of our internal reforms is that the Office of Personnel Management's government-wide survey of employee views on leadership, results orientation, talent management, and job satisfaction identified the FCC as the Most Improved Agency in the Federal Government.

I'm proud of what we have achieved. The Commission is working effectively. We are moving in the right direction. And I thank my fellow

Commissioners as well as the FCC's career employees who have been instrumental in making this possible.

Of course, there is more we can do to improve performance and I am committed to continuing our efforts at reform. Making the FCC work is so important, because the FCC's mission is so important. It matters to our economy, to our global competitiveness, and to the quality of life for all Americans.

I look forward to working with the Subcommittee on these important issues.

Thank you.

Mr. WALDEN. And we will get that high-technology ringing device off over there in the corner. We are also streaming—if you notice on the video screens here, all of your data is streaming over your faces, too. It is part of what happens in repacking if you don't get it right. So great to be the technology.

Anyway, we want to go now to the senior member of the Federal Communications Commission by length of service, I will only approach it that way. We appreciate your service to the country and on the Federal Communications Commission, Mr. Copps, and we welcome your testimony and comments.

STATEMENT OF MICHAEL COPPS

Mr. COPPS. Thank you very much. Good morning, Chairman Walden, Ranking Member Eshoo, members of the subcommittee. Thank you for holding this important meeting on FCC reform and for inviting me to share some thoughts with you.

As Chairman Genachowski has explained, and many of you have already noted, we have had real and measurable accomplishments toward FCC reform under this current Commission, and I am proud of those.

I know there are many other ideas and proposals you will want to discuss this morning, and I am happy to comment on any of them, but in my brief time now, I want to mention just three ideas that I find especially important.

First and foremost, please allow the Commissioners to talk to one another. That seems a strange request in a town fueled by dialogue and debate when in FCC world, when three or more of us are ever together outside of a public meeting, we must get lockjaw. We cannot mention one iota of policy or substance, float one idea for resolving a crisis, or suggest any alternative path for addressing a problem. This has not only irked me for years, but troubled me greatly, because it is like sending a football team into a huddle and prohibiting the players from talking to one another. That is the FCC under the closed-meeting rule: the silent huddle.

So the first thing I want to do this morning is to applaud Congressman Anna Eshoo and Congressman John Shimkus and Congressman Mike Doyle for the introduction of their FCC Collaboration Act. This proposed legislation is a modest, commonsense, and much-needed reform to modify the closed-meeting rule that prohibits more than two Commissioners from ever talking to one another unless it is in a public meeting. I have spoken about the need for this reform for many years before the subcommittee. I am hopeful this will be the year when legislation is finally enacted.

I have seen first-hand for the pernicious and unintended consequences of this prohibition, stifling collaborative discussions among colleagues, delaying timely decisionmaking, discouraging collegiality, and shortchanging consumers and the public interest.

Elected representatives, Cabinet officials, judges, even the cardinals of my Catholic Church have the opportunity for face-to-face discussion before making important issues. I see no reason why the FCC Commissioners should not have the same opportunity to reason together, especially when balanced, as this legislation is, with specific safeguards designed to preserve transparency. If it is good

enough for Congress, the courts, and Holy Mother Catholic Church, it ought to be good enough for the FCC.

Reaching agreement on the complex issues pending before us is difficult enough in the best of circumstances, but it is infinitely more so when we cannot even talk about them among ourselves. Each of the five Commissioners brings to the FCC special experiences and unique talents that we cannot fully leverage without communicating directly with one another.

This act is a prudent, balanced proposal that recognizes the benefits of permitting the Commission to do its business collectively, while maintaining full transparency of the process. Enactment of this legislation would, in my mind, constitute as major a reform of Commission procedures as any that I can contemplate. It doesn't just protect the public interest, it advances the public interest. And it is number one on my list.

My second suggestion is let us get the FCC out of Washington and on the road more frequently; I mean the full Commission, all of the Commissioners. We live too much in an isolated, inside-the-Beltway culture. We see the usual players, make the same speeches every year, and attend the same functions and events. And that is fine up to a point, but if it comes at the expense of letting America see the FCC and letting the FCC see America, it is not so good. Our deliberations would surely and greatly benefit from taking the FCC outside Washington, DC, and put it on the road so it could directly hear from average Americans.

The Commission holds an open meeting each month, and I see no reason why for at least few months out of a year we couldn't conduct our meetings in places like Bend, or Benton Harbor, or Boston, or Austin, or Mountain View. In communications, every American is a stakeholder, and each of us is affected in so many important ways by our media policies, spectrum allocations, and universal service, just to name a few big-ticket items on our agenda.

The idea here is not just that people would see the Commission, but that the Commission would see the people and gain a greater understanding of the impact of our decisions on American consumers. It is just better communications, and, after all, Communications is our middle name.

Third, and this is related to what I just suggested, we need to encourage more input into our deliberations by what I have called our nontraditional stakeholders. Although we hear often, sometimes every day, from the big interests with their armies of lawyers and lobbyists, we hear much less from everyone else, all of those consumers and citizens who don't have a lobbyist or lawyer in town to represent them, but who nevertheless have to live with the consequences of what we do in Washington.

I have devoted considerable time during my years at the Commission to open our doors to the full panoply of American stakeholders, including minorities, rural Americans, the various disabilities communities, Native Americans, consumer and advocacy organizations, and also educational institutions. We were designed to be a consumer protection agency. Let us get the skinny from those who consume what you and I do in Washington, DC.

Another area where we need to see more progress and partnering is in the Federal, State, local governmental relationship. I believe more of this kind of interaction was envisioned and encouraged by the Telecommunications Act of 1996. As we embark upon the formidable challenge of revamping universal service and intercarrier compensation, it is vitally important that we are sharing data, sharing ideas and sharing responsibilities with our colleagues at all levels of government.

I commend the Chairman for moving us forward in this regard and also my colleague Commissioner Clyburn for the excellent work she has done to reinvigorate our partnerships with the States as Chair of the Federal-State Joint Boards. We need always to be thinking about how to build upon the experiences and knowledge that exist in such abundance at all levels of government.

Let me say that this present Commission has made many and impressive, important strides to increase transparency, to work collaboratively with all stakeholders, and to hold workshops both inside and outside the Nation's Capital. The Chairman's statement recounts many of these, and I commend him for the progress that has been made.

My point is this work is never done, and there is much more that we can still do. There are years, decades of "inside-the-Beltway-itis" to make up for, and this demands some fundamental reorientation of the Commission. We can talk about deadlines, shot clocks, what is an NOI versus an NPRM, and those are all relevant matters to discuss. But above them all is giving consumers and citizens confidence that their voices are being heard, their suggestions given credence, and knowing that their Commission exists to serve the public interest, a term that, by my rough count, appears some 112 times in the Telecommunications Act. That is our lodestar, and we need to keep our fix on that lodestar every minute of every day.

Thank you for convening this conversation, and I look forward to your comments and suggestions for the betterment of the Good Ship FCC.

Mr. WALDEN. Mr. Copps, thank you, as always, for your comments and suggestions.

[The prepared statement of Mr. Copps follows:]

TESTIMONY OF
FCC COMMISSIONER MICHAEL J. COPPS
U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
*****
HEARING ON "FCC PROCESS REFORM"
MAY 13, 2011

Good morning Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee. Thank you for inviting me to appear before you today and to share my perspective on reform at the Federal Communications Commission.

I've been privileged to serve at the Federal Communications Commission for ten years as of this month. In so many ways, we are worlds beyond where we were in May of 2001 in terms of technology, mind-boggling innovation and new services for consumers. For someone who can remember traipsing around the Upper Peninsula of Michigan as a kid and using an old crank phone in the town's general store to call my parents back home, it's been quite a ride. But some things remain the same—namely, the need for policies that will continue to spur innovation, promote competition, and ensure that every American shares in the benefits of advanced telecommunications and world-class media.

Many members of this Subcommittee know that the concept of the public interest has been my guiding lodestar during my tenure at the FCC. It is at the core of my own philosophy of government. But, much more importantly, it is at the heart of the statutes the Commission is charged with implementing. By my rough count, the term "public interest" appears 112 times in the Communications Act. So the Commission has not merely the discretion to consider the public interest in its decisions—it has the statutory obligation to take only actions that are in the public interest. I believe Congress made it abundantly clear that this is the prism through which we must look as we make our decisions.

I know there are many ideas and proposals we will be discussing today, and I am happy to comment on any you may wish, but in my brief time now, I want to mention a few that I find especially important.

First and foremost, I applaud Congresswoman Anna Eshoo, Congressman John Shimkus, and Congressman Mike Doyle for the introduction of the FCC Collaboration Act. Their proposed legislation is a modest, common-sense and much-needed reform to modify the Closed Meeting Rule that prohibits more than two Commissioners from ever talking with one another outside of a public meeting. I have spoken about the need for this reform for many years and in countless appearances before the Congress. I am hopeful this will be the year when legislation is finally enacted.

I have seen first-hand the pernicious and unintended consequences of this prohibition—stifling collaborative discussions among colleagues, delaying timely

decision-making, discouraging collegiality and short-changing consumers and the public interest. Elected representatives, cabinet officials, judges and just about everyone else have the opportunity for face-to-face discussion before deciding public issues. I see no reason why Commissioners of the FCC should not have the same opportunity to reason together—especially when balanced, as this legislation is, with specific safeguards designed to preserve transparency. Reaching agreement on the complex issues pending before us is difficult enough in the best of circumstances, but is infinitely more so when we cannot even talk about them among ourselves. Each of the five Commissioners brings to the FCC special experiences and unique talents that we cannot fully leverage without communicating directly with each other. The FCC Collaboration Act is a prudent, balanced proposal that recognizes the benefits of permitting the Commission to do its business collectively while maintaining full transparency of the process. Enactment of this legislation would, in my mind, constitute as major a reform of Commission procedures as any I can contemplate. It doesn't just protect the public interest—it advances the public interest. It's first on my list.

This Commission has made many important strides to increase transparency and work collaboratively with all stakeholders—but there is always more to be done on this score. When I was serving as Acting Chairman of the FCC, we began the process of reforming the Commission's *ex parte* rules to improve the openness and credibility of our work. Now, parties making oral *ex parte* presentations must file a summary for every *ex parte* presentation (not just those that involve new information or arguments). The summary must state who made the presentation and who participated in the meeting, and describe all data presented and arguments made (not just new material). And these rules have teeth – our Enforcement Bureau is now authorized to levy forfeitures for *ex parte* violations. Strong *ex parte* rules are critical to ensuring that everyone has a fair opportunity to respond to arguments made in oral communications with the Commission. The new rules are just going into effect and I believe that with vigilant enforcement at the outset, they will serve the public interest by bringing more transparency and credibility to our processes.

Although we hear often from the big interests with their armies of lawyers and lobbyists, we hear much less from what I call our "non-traditional stakeholders"—all those consumers and citizens who don't have a lobbyist or lawyer in town to represent their concerns before the FCC, even though they are the overwhelming majority of folks who must live with the consequences of what we do in Washington. I have devoted considerable effort during my years at the Commission to open our doors to the full panoply of American stakeholders, including minorities, rural Americans, the various disabilities communities, members of Native Americans, consumer and advocacy organizations and also educational institutions. Thanks to the leadership of this Committee, and Representative Ed Markey in particular, the Commission has been hard at work since the passage of the Twenty-First Century Communications and Video Accessibility Act to implement this historic new civil rights law. I'm thrilled that we are working to make the tools of the digital age accessible to all Americans, cognizant of the fact that fulfilling this mandate from Congress requires close collaboration not only with industry and standards setting organizations but also the disabilities community. The

Commission has also made great progress to collaborate and engage with Native Nations—who have so often been on the wrong side of the digital divide. Last August, the Commission created the Office of Native Affairs and Policy and we have beefed up, by orders of magnitude, the FCC's resources dedicated to building a better trust relationship with Tribal Governments. Solving these generations-long and deep-rooted problems, however, requires sustained commitment and resources on the part of our agency to get the job done. And as regards educational institutions, rarely do I attend a public event or town hall meeting outside Washington, DC where someone from a nearby college or university doesn't call to my attention ongoing research that could better inform our decision-making at the FCC if only we knew about it. There is much more outreach and collaboration the Commission could be doing in this area as in so many others.

Our deliberations would also surely and greatly benefit from taking the FCC outside Beltway and put it on the road so it could hear directly from average Americans. The Commission holds an Open Meeting each month and I see no reason why, for at least a few months out of the year, we couldn't conduct our open meetings in places like Bend or Benton Harbor or Boston or Austin or Mountain View. In communications, every American is a stakeholder, and each of us is affected in so many important ways by our media policies, spectrum allocations, and mechanisms to support Universal Service—just to name a few big ticket items on the FCC agenda. The idea here is not just that people would see the Commission, but that the Commission would see the people and gain a greater understanding of the impact of our decisions on American consumers. It's just better communications and, after all, Communications is our middle name.

Another area where we need to see more progress and partnering is in the federal-state-local governmental relationship. I believe this kind of cooperation was envisioned and encouraged by the Telecommunications Act of 1996. As we embark upon the formative stages of revamping Universal Service and Intercarrier Compensation, it is vitally important that we are sharing data, sharing ideas and sharing responsibility with our colleagues in other governmental jurisdictions. I commend the Chairman for moving us forward in this regard and also my colleague Commission Clyburn for the excellent work she has done to reinvigorate our partnerships with the states as Chair of the Federal-State Joint Boards. We need always to be thinking about how to build upon the experiences and knowledge that exist in such abundance at all levels of government.

Sound communications policies depend also on private sector-public sector partnerships. Here's one example: we have a long and successful history of infrastructure-building in this country—and more often than not, we met our challenges by industry and government working together. Private enterprise certainly leads the way but it works best when there is a sense and a public vision of where the country is headed. I often reference our country's history building roads and bridges, railroads and interstate highways, nationwide electricity grids and plain old telephone service. We also harnessed this kind of collaboration during the final count-down to the digital television transition, while I was Acting Chairman of the Commission. This involved unprecedented coordination between government and industry, and among government agencies, to

minimize disruptions for consumers and broadcasters. If we can apply this kind of spirit to the challenges ahead of us, I believe the Commission—and the country—can accomplish a whole lot. One final thought on partnering: our advisory committees provide expert forums for working together to develop solutions to sometimes very technical problems. In the fast-changing world we live in, new and novel problems seem constantly to present themselves. I believe the Federal Advisory Committee (FACA) process needs to be streamlined to allow the easier and more expeditious convening of expert groups to tackle these kinds of problems. The process now is slow, cumbersome and not sufficiently considerate of advisory committee members.

Thank you for convening this conversation and I look forward to your comments and suggestions for the betterment of the Good Ship FCC.

Mr. WALDEN. I go now to Commissioner McDowell. We welcome you. We appreciate your thoughtful addition to this discussion, and we welcome your testimony.

STATEMENT OF ROBERT MCDOWELL

Mr. MCDOWELL. Thank you, Chairman Walden, and Ranking Member Eshoo, all members of the committee. And I also see a familiar face sitting behind Mr. Stearns over there, Brooke Ericson, my former law clerk. And now that you are my overseer, I really am hoping I was a nice boss.

But as you know, Congress created the FCC in 1934, almost 77 years ago. In that year Babe Ruth signed a contract for an eye-popping $35,000 a year. Donald Duck made his movie debut, the average new house cost less than $6,000, the entire Federal budget was only $6.5 billion, and a gallon of gas cost 10 cents. And, my, how times have changed.

Although a few amendments have been made to the laws of the Commission—the laws the Commission operates under since then, many of the regulatory legacies from 1934 remain in place. The technologies we take for granted in today's communication's marketplace were unimaginable to even the most creative of science fiction writers when existing mandates were written.

Against this backdrop it is fitting for this committee to examine ways to reform the FCC to make it more efficient and relevant to modern realities. I operate under the philosophy that Congress should tell us what to do and not the other way around, but given your solicitation of suggestions, I will start by raising several possible statutory changes to improve the FCC before moving on to possible procedural reforms that we could effectuate.

Twenty-first-century consumers want to have the freedom to enjoy their favorite applications and content when and where they choose. Whether such material arrives over coaxial cable, copper wires, fiber or radio waves is of little consequence to most consumers so long as the market's supply of products and services satisfies demand. Legacy statutory constructs, however, have created market-distorting legal stovepipes based on the regulatory history of particular delivery platforms. While consumers demand that functionalities and technologies converge, regulators and business people alike are forced to make decisions based on whether a business model fits into Titles 1, 2, 3, 6, or none of the above. As Congress contemplates FCC reform, it may want to consider adopting an approach that is more focused on preventing concentrations and abuses of market power that result in consumer harm.

Furthermore, ideas from outside the Commission also deserve serious consideration. For instance, Randy May, the president of the Free State Foundation, has called for building on the deregulatory bent of sections 10 and 11 of the Telecom Act of 1996 by adding an evidentiary presumption during periodic regulatory reviews that would enhance the likelihood of the Commission reaching a deregulatory decision.

With respect to procedural ideas, almost 2 1/2 years ago, I sent to my colleague, then-Acting Chairman Mike Copps, a public letter detailing some ideas to improve our agency's effectiveness. He and I agree on many reform ideas, such as modernization of the cum-

bersome and outdated sunshine rules that prevent more than two of us from discussing Commission business outside of a public meeting. Later, in July of 2009, after Julius Genachowski became a Commission colleague as well, I sent him an updated letter with additional ideas and suggestions within existing statutory constructs. Time does not allow me to enumerate all of them, so I have attached these letters as part of my testimony and respectfully request to be included in the record.

I am delighted to report that some reforms have already been implemented. For example, many stale or ill-advised Commission action items awaiting votes contained on what we call the circulation list have been weeded out. A portion of the backlog of the 1.4 million broadcast indecency complaints that were defective on their face have been dismissed. And the FCC now relies more on electronic internal communications rather than paper deliveries.

Going forward, I am hopeful that other FCC reform suggestions will be carried out as well. I have long called for a full and public operational, financial, and ethics audit of everything connected to the FCC, including the Universal Service Administrative Company, also known as USAC. The erroneous payment rate in the High Cost Fund alone has been far too high, and we may need to make fundamental changes to fix the problem.

Chairman Genachowski has made good progress in ensuring that notices of proposed rulemaking contain actual proposed rules. I applaud his efforts. I would encourage improving the process further by codifying this requirement in our rules.

The Commission should include proper market power analyses to justify new rules in notices of proposed rulemaking. If a market power analysis is not appropriate, the FCC should explain why.

When regulated entities are under scrutiny for alleged violations of our rules, such as broadcasters being investigated for airing indecent material, often they are not notified in a timely manner of the investigation or its effects on other matters before the Commission, such as license renewals. Similarly, entities are not always informed of when they have been cleared of wrongdoing. More transparency and better communication in this area would not only be a matter of appropriate due process, but simple good government as well.

To promote collegiality and efficiency we could improve the productivity of all Commissioners' offices by routinely sharing options memoranda prepared by our talented career public servants. All Commissioners should be able to benefit from the same advice and analysis enjoyed by our many chairmen over the years. And perhaps we could call this our "No Commissioner Left Behind" program.

Many, many, many more ideas abound, and I look forward to discussing all suggestions and ideas with you, and thank you again for the opportunity to appear before you today, and I look forward to your questions.

Mr. WALDEN. Commissioner McDowell, thank you for your suggestions.

[The prepared statement of Mr. McDowell follows:]

SUMMARY
STATEMENT OF COMMISSIONER ROBERT M. McDOWELL

May 13, 2011

Twenty-first Century consumers want to have the freedom to enjoy their favorite applications and content when and where they choose. Legacy statutory constructs, however, have created market distorting legal stovepipes based on the regulatory history of particular delivery platforms. As Congress contemplates FCC reform, it may want to consider adopting an approach that is more focused on preventing concentrations and abuses of market power that result in consumer harm. Other statutory changes could include modernizing the Sunshine in Government Act to increase our efficiency and spirit of collaboration while preserving openness and transparency.

Ideas from outside the Commission also deserve serious consideration. For instance, Randy May, President of the Free State Foundation, has called for building on the deregulatory bent of Sections 10 and 11 from the Telecommunications Act of 1996 by adding an evidentiary presumption during periodic regulatory reviews that would enhance the likelihood of the Commission reaching a deregulatory decision. Others have noted that various statutory provisions require the Commission to file annual reports on various topics of which the preparation of each can be a monumental and costly undertaking. I would respectfully propose that, rather than requiring that the Commission submit these reports annually, Congress might consider amending the Act to require biennial submissions.

Some reforms have already been internally implemented by the FCC but going forward, I'm hopeful that other FCC reform suggestions will be carried out as well.

- I have long called for a full and public operational, financial and ethics audit of everything connected to the FCC, including the Universal Service Administrative Company (USAC).
- More notices of proposed rulemaking should contain actual proposed rules. The Commission has made progress in this area under Chairman Genachowski. I would encourage improving the process by codifying this requirement in our rules.
- The Commission should include proper market power analyses to justify new rules in notices of proposed rulemaking. If a market power analysis is not appropriate, we should explain why.
- When regulated entities are under scrutiny for alleged violations of our rules, such as broadcasters being investigated for airing indecent material, often they are not notified in a timely manner of the investigation or its effect on other matters before the Commission, such as license renewals.
- We could improve the productivity of all commissioners' offices by routinely sharing options memoranda prepared by our terrific career public servants.
- The FCC's transaction reviews are in dire need of reform. The Commission should not impose conditions that do not narrowly cure consumer harm arising directly out of the transaction. In the same spirit, the FCC should honor its 180-day merger review shot clock.
- We could take a cue from other agencies, such as the Federal Trade Commission, by posting our annual budget, performance and accountability report on the FCC website.
- We should constantly examine the FCC's assessment of fees. The good news for the American taxpayer is that the FCC earns its own keep through the collection of fees, fines and auction revenues. The bad news is that the Commission has a history of collecting more in fees than its budget requires.

STATEMENT
OF
COMMISSIONER ROBERT M. MCDOWELL
FEDERAL COMMUNICATIONS COMMISSION

BEFORE THE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
COMMITTEE ON ENERGY & COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

MAY 13, 2011

Thank you, Chairman Walden and Ranking Member Eshoo, for inviting me to join you today.

As you know, Congress created the FCC in 1934, almost 77 years ago. In that year, Babe Ruth signed a contract for an "eye-popping" $35,000 a year. Donald Duck made his movie debut. The average new house cost less than $6,000. The entire federal budget was only $6.5 billion. And a gallon of gas cost 10 cents. How times have changed. Although a few amendments have been made to the laws the Commission operates under since then, many of the regulatory legacies from 1934 remain in place. The technologies we take for granted in today's communications marketplace were unimaginable to even the most creative of science fiction writers when existing mandates were written.

Against this backdrop, it is fitting for this Committee to examine ways to reform the FCC to make it more efficient and relevant to modern realities. I operate under the philosophy that Congress should tell us what to do, and not the other way around. Given your solicitation of suggestions, however, I will start by raising several possible statutory changes to improve the FCC before moving on to possible procedural reforms.

Twenty-first Century consumers want to have the freedom to enjoy their favorite applications and content when and where they choose. Whether such material arrives over coaxial cable, copper wires, fiber or radio waves is of little consequence to most consumers so long as the market's supply of products and services satisfies demand. Legacy statutory constructs, however, have created market distorting legal stovepipes based on the regulatory history of particular delivery platforms. While consumers demand that functionalities and technologies converge, regulators and business people alike are forced to make decisions based on whether a business model fits into Titles I, II, III, VI, or none of the above. As Congress contemplates FCC reform, it

may want to consider adopting an approach that is more focused on preventing concentrations and abuses of market power that result in consumer harm.

Other statutory changes could include modernizing the Sunshine in Government Act to increase our efficiency and spirit of collaboration while preserving openness and transparency.

Furthermore, ideas from outside the Commission also deserve serious consideration. For instance, Randy May, President of the Free State Foundation, has called for building on the deregulatory bent of Sections 10 and 11 from the Telecommunications Act of 1996 by adding an evidentiary presumption during periodic regulatory reviews that would enhance the likelihood of the Commission reaching a deregulatory decision.

Additionally, various statutory provisions require the Commission to file annual reports on various topics; such as, the Wireless Competition Report,[1] Satellite Competition Report,[2] Section 706 Report,[3] and Video Competition Report.[4] As you would imagine, preparation of each is a monumental and costly undertaking. I would respectfully propose that, rather than requiring that the Commission submit these reports annually, Congress might consider amending the Act to require biennial submissions. For example, filing each sometime within the first quarter of odd-numbered years would allow each incoming Congress to have fresh data at hand for any possible legislative considerations. Moreover, this amendment would remove the Commission from what sometimes seems like perpetual reporting mode.

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[1] *See* The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and codified at 47 U.S.C. § 332(c).

[2] *See* Pub. L. No. 109-34, 119 Stat. 377 (2005), which amended the Communications Satellite Act of 1962 and is codified at 47 U.S.C. § 703.

[3] *See* 47 U.S.C. § 1302(b) (2010). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (the Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), codified in Title 47, Chapter 12 of the United States Code. *See* 47 U.S.C. § 1301 *et seq.*

[4] *See* Pub. L. No. 102-385, 106 Stat 1460 (1992). Congress imposed an annual reporting requirement on the Commission in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") as a means of obtaining information on "the status of competition in the market for the delivery of video programming." *See also* 47 U.S.C. § 548(g).

With respect to procedural ideas, almost two and a half years ago, I sent to my colleague then Acting Chairman Mike Copps, a public letter detailing some ideas to improve our agency's effectiveness. He and I agree on many reform ideas, such as modernization of the cumbersome and outdated "Sunshine" laws that prevent more than two of us from discussing Commission business outside of a public meeting (as noted above). Shortly thereafter, in July of 2009, after Julius Genachowski became a Commission colleague as well, I sent him an updated letter with additional ideas and suggestions within existing statutory constructs. Time does not allow me to enumerate all of them, so I have attached both letters to this testimony, and I respectfully request that they be made part of the record.

I am delighted to report that some reforms have already been implemented. For example, many stale or ill-advised Commission action items awaiting votes contained on what we call the "circulation list" have been weeded out. A portion of the backlog of the 1.4 million broadcast indecency complaints that were defective on their face has been dismissed. Several of those complaints were older than some of my children, by the way. The FCC now relies more on electronic internal communications rather than paper deliveries. That seems fitting given our agency's mission and name. And a beta version of a new website has been launched. I encourage anyone with an interest in communications issues to take it for a test drive and post your constructive suggestions and comments.

Going forward, I'm hopeful that other FCC reform suggestions will be carried out as well.

- I have long called for a full and public operational, financial and ethics audit of everything connected to the FCC, including the Universal Service Administrative Company (USAC). The erroneous payment rate in the High Cost Fund alone has been far too high, and we may need to make fundamental changes to fix the

problem. Only after a thorough due diligence review, however, will we have the information needed to make an accurate diagnosis.

- Chairman Genachowski has made good progress on ensuring that notices of proposed rulemaking contain actual proposed rules. I applaud his efforts. I would encourage improving the process further by codifying this requirement in our rules. We would all agree that future Commissions, not to mention interested parties, would benefit from the certainty associated with making this change permanent.
- The Commission should include proper market power analyses to justify new rules in notices of proposed rulemaking. If a market power analysis is not appropriate, the FCC should explain why.
- When regulated entities are under scrutiny for alleged violations of our rules, such as broadcasters being investigated for airing indecent material, often they are not notified in a timely manner of the investigation or its effect on other matters before the Commission, such as license renewals. Similarly, entities are not always informed of when they have been cleared of wrong-doing. More transparency and better communication in this area would not only be a matter of appropriate due process, but good government as well.
- To promote collegiality and efficiency, we could improve the productivity of all commissioners' offices by routinely sharing options memoranda prepared by our talented career public servants. All commissioners should be able to benefit from the same advice and analysis enjoyed by our many chairmen over the years. Perhaps we could call this our "No Commissioner Left Behind" program.

- Both the procedural and substantive work product of the FCC's transaction reviews are in dire need of reform. The Commission should not impose conditions that do not narrowly cure consumer harm arising directly out of the transaction. In the same spirit, the FCC should honor its 180-day merger review shot clock.
- Taking a cue from our colleagues at the Federal Trade Commission, the National Labor Relations Board, the Equal Employment Opportunity Commission, the Federal Energy Regulatory Commission, and the U.S. Commodity Futures Trading Commission, the FCC should post its annual budget, performance and accountability report on the FCC website in a conspicuous manner. Easy access to our budget, the results of our regulatory actions and our financial performance would demonstrate to Congress and the public how the FCC accounts for the resources entrusted to it. Investors receive annual reports from mutual funds and companies in which they invest. There is no reason why the taxpayer should not have access to the same from government agencies.
- Last but not least, we should constantly examine the FCC's assessment of fees. The good news for the American taxpayer is that the FCC earns its own keep through the collection of fees, fines and auction revenues. The bad news is that the Commission has a history of collecting more in fees than its budget requires. This "tax" of sorts is ultimately paid for by American consumers.

Many more ideas abound, and I look forward to discussing with you all suggestions. Thank you again for the opportunity to appear before you today.

Exhibit A

Letter from FCC Commissioner Robert M. McDowell to FCC Acting Chairman Michael Copps (January 27, 2009).

Letter from FCC Commissioner Robert M. McDowell to FCC Chairman Julius Genachowski (July 20, 2009).

Office of Commissioner Robert M. McDowell
Federal Communications Commission
Washington, D.C. 20554

January 27, 2009

The Honorable Michael J. Copps
Acting Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear Mike:

Once again, congratulations on being named Acting Chairman. Additionally, thank you for your dedication and commitment to public service and the Commission. It goes without saying that I am looking forward to continuing to work with you.

I am greatly encouraged and energized to know that you, Commissioner Adelstein and I will be working together toward the goals of boosting employee morale, promoting greater transparency, as well as creating a more informed, collaborative and considerate decision-making process, all aimed toward advancing the timely and orderly resolution of Commission business. Thank you for addressing these and many other issues within minutes of becoming Acting Chairman. I certainly appreciate the new atmosphere you are creating at the Commission, and I know that the FCC's talented and dedicated career employees appreciate your efforts as well. Accordingly, with the utmost respect for you, the Commission staff and the new Obama Administration, I offer below several preliminary suggestions on achieving the important public interest objectives of reforming this agency. My letter is intended to continue a thoughtful dialogue on moving forward together to improve the public's ability to participate in our work, as well as our overall decision-making abilities. Our collaborative efforts to rebuild the agency should not be limited to the thoughts outlined in this brief letter. As you and I have discussed many of these ideas already, let this merely serve as a starting point for a more public discussion that should examine a larger constellation of ideas.

I would first recommend that we commence a thorough operational, financial and ethics audit of the Commission and its related entities, such as the Universal Service Administrative Company and the Federal Advisory Committees. As with all FCC reform endeavors, I hope that all of the commissioners will be involved in this process, including its development and initiation. We should seek comment from the public and the Commission staff, and we should provide Commission employees with an opportunity to submit comments anonymously.

I would also suggest that we work to update and republish the Commission's strategic plan. Completing this task would create a solid framework for future actions and demonstrate our commitment to transparency and orderliness, each of which is critical to effective decision making.

The findings of our review, combined with our work to develop a new strategic plan, would provide us with the information and ideas necessary for considering a potential restructuring of the agency. I am not suggesting that we make change for the sake of change. After all, we agree that the agency needs to be flexible and must be responsive to its myriad stakeholders, most importantly American consumers. There are, however, steps we likely would want to implement to increase our efficiency. For example, as you have already stated, delegating some authority back to upper and mid-level management, filling many of the numerous open positions with highly-qualified applicants and making more efficient use of non-attorney professionals come to mind.

As we have also discussed previously, we need to improve our external communications regarding FCC processes and actions. As an immediate first step, I suggest that we swiftly establish and publish Open Meeting dates for the entire 2009 calendar year. The public, not to mention the staff, would also greatly benefit if we would provide at least six months' notice on meeting dates for 2010 and beyond.

Also, we agree that we need to overhaul our internal information flow, collaboration and processes. I am eager to continue to work with you and Commissioner Adelstein to identify and implement measures to increase coordination among the commissioner offices, between commissioner offices and the staff, as well as among the staff. It is important that we cooperate with each other to foster open and thoughtful consideration of potential actions well before jumping into the drafting process.

As part of these communications improvements, I share your desire to update the Commission's IT and web systems. They are in dire need of an overhaul. Clear, concise and well-organized information systems will ensure that all public information is available, easily located and understandable.

Finally, I propose that the commissioners work together to build an ongoing and meaningful rapport with other facets of government, especially in the consumer protection, homeland security, and technology areas. I am confident that close collaboration with our government colleagues with similar or overlapping responsibilities would greatly benefit the constituencies we serve.

In closing, Mike, I again extend my warmest congratulations on your designation as Acting Chairman. I look forward to working together with you and Commissioner Adelstein to improve our agency during the coming days and weeks.

Sincerely,

Robert M. McDowell

cc: The Honorable Jonathan S. Adelstein

Office of Commissioner Robert M. McDowell
Federal Communications Commission
Washington, D.C. 20554

July 20, 2009

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear ~~Mr. Chairman~~ Julius:

Once again, congratulations on your nomination and confirmation as Chairman. I am greatly encouraged and energized to know that you, Commissioner Copps and I will be working together on a plethora of communications policy challenges facing the economy and American consumers. Although you have only been here for three weeks, I applaud the steps you have already taken to reform the agency. Your recent statements regarding boosting employee morale, promoting greater transparency, and creating a more informed, collaborative and considerate decision-making process are heartening. Anything we could do to advance the timely and orderly resolution of Commission business would be constructive. I am confident that you will agree that the preliminary steps Mike took during his interim chairmanship have provided a sound footing upon which to build.

Accordingly, in the collaborative and transparent spirit of my January 29, 2009, letter to Mike, I offer below a number of suggestions on achieving the important public interest objectives of reforming this agency. As you and I have already discussed, these thoughts are intended as a starting point for a more public discussion that should examine a larger constellation of ideas for moving forward together to improve the public's ability to participate in our work, as well as our overall decision-making abilities. Many of these ideas have been discussed by many people for a long period of time, and if we don't care who gets the credit we can accomplish a great deal.

Operational, financial and ethics audit.

I would first recommend that we commence a thorough operational, financial and ethics audit of the Commission and its related entities, such as the Universal Service Administrative Company, the National Exchange Carrier Association and the federal advisory committees. Just as you recently articulated in your June 30 request for information on the Commission's safety preparedness, I would envision this audit as an examination akin to a due diligence review of a company as part of a proposed merger or acquisition, or after a change in top management. I would not envision the process taking a lot of time; yet, upon completion, we would be better positioned to identify and assess the current condition of the FCC and its related entities, as well as how they operate.

This undertaking would be a meaningful first step on the road to improving the agency. As with all FCC reform endeavors, I hope that all of the commissioners would be involved in this process, including its development and initiation. We should seek comment from the public and the Commission staff, and we should provide Commission employees with additional opportunities to submit comments anonymously. I also propose that we hold a series of "town hall" meetings at the FCC's Washington headquarters, at a few field offices, as well as in a few locations around the country to allow our fellow citizens to attend and voice their opinions directly to us.

As part of a financial review, it is crucially important that we examine the Commission's contracting process, as well as the processes relating to the collection and distribution of administrative and regulatory fees currently conducted exclusively by the Office of Managing Director. For instance, we should consider whether the full Commission should receive notice prior to the finalization of significant contracts or other large transactions.

In the same vein, it is time to examine the Commission's assessment of fees. Regulatory fees are the primary means by which the Commission funds its operations. You may be aware that the FCC actually makes money for the tax payers. As Mike has also noted, our methodology for collecting these fees may be imperfect. At first blush, it appears that we may have over-collected by more than $10 million for each of the last two years. Some have raised questions regarding how the fee burden is allocated. Our recent further notice of proposed rulemaking could lead to a methodology that lowers regulatory fees and levies them in a more nondiscriminatory and competitively neutral manner.

We should also work with Congress to examine Section 8 of the Act and the Commission's duty to collect administrative fees. I am hopeful that we will examine why we continue to levy a tax of sorts of allegedly $25 million or so per year on industry, after the Commission has fully funded its operations through regulatory fees. As you may know, that money goes straight to the Treasury and is not used to fund the agency. Every year, we increase those fees to stay current with the Consumer Price Index. At the same time, our regulatees pass along those costs to consumers and they are the ones who ultimately pay higher prices for telecommunications services.

Further, given the significant concerns raised about the numbers and the way the audits have been conducted, I recommend that we examine the financial management of the universal service fund. You may know that the Commission's Inspector General reported last year that the estimated erroneous payment rate for the High Cost program between July 2006 and June 2007 was 23.3 percent, with total estimated erroneous payments of $971.2 million. While I am pleased that the OIG identified this error, it is time that we get to the bottom of this matter and remedy it.

In the same spirit, an ethics audit should ensure that all of our protocols, rules and conduct are up to the highest standards of government best practices. Faith in the ethics of government officials has, in some cases, eroded over the years and we should make sure that we are doing all that we can to maintain the public's trust.

Update and republish the FCC strategic plan.

Also in connection with this review, I hope that we can work together to update and republish the Commission's strategic plan. Like me, you may find that, as we toil on day-to-day tasks, it can be easy to lose sight of our strategic direction. Completing this task would create a solid framework for future actions and demonstrate our commitment to transparency and orderliness, each of which is critical to effective decision making.

Potential restructuring of the agency.

The findings of our review, combined with our work to develop a new strategic plan, would provide us with the information and ideas necessary for considering a potential restructuring of the agency. As you know, the Commission has been reorganized over the years – for instance, the creation of the Enforcement Bureau under Chairman Kennard and the Public Safety and Homeland Security Bureau under Chairman Martin. Close coordination among the staff in pursuit of functional commonality historically has improved the Commission's effectiveness. Nonetheless, the time is coming again to reconsider this option.

I am not suggesting that we make change for the sake of change. After all, we would agree that the agency needs to be flexible and must be responsive to its myriad stakeholders, most importantly American consumers. There are, however, additional improvements we can make to increase our efficiency. As Mike emphasized, the Commission's most precious resource, really our *only* resource, are its people. Many of our most valued team members are nearing retirement age. We need to do more to recruit and retain highly-qualified professionals to fill their large shoes. I hope our next budget will give us adequate resources to address this growing challenge.

Next, I would encourage consideration of filling many of the numerous open positions with highly-qualified applicants and making more efficient use of non-attorney professionals. For example, there is no reason why we cannot use engineers to help investigate complaints and petitions that involve technical and engineering questions. This would be especially useful as we continue to consider matters pertaining to network management. Similarly, our economists could be better used to help assess the economic effects of our proposed actions.

Improve external communication.

As you and I have also discussed, we need to improve our external communications regarding FCC processes and actions. I greatly appreciate Mike's promptness in posting the Open Meeting dates covering his tenure. I am hopeful that we will swiftly establish and publish Open Meeting dates for the entire 2009 calendar year. The public, not to mention the staff, would also greatly benefit if we would provide at least six months' notice on meeting dates for 2010 and beyond.

As part of these communications improvements, I look forward providing input as to updating the Commission's IT and web systems. I applaud your commitment to this endeavor and Mike's success in securing additional funding toward this end. Clear, concise and well-organized information systems will ensure that all public information is available, easily located and understandable. I also recommend that we update the General Counsel's part of the website to include litigation calendars, as well as access to pleadings filed by all the parties. Additionally, I suspect that our customers would prefer that licenses of all stripes be housed in one database, rather than separate databases spread across the stovepipes of our several bureaus. We should seek comment on this, and other similar administrative reform matters.

In addition, I propose that we create, publish on the website and update regularly an easy-to-read matrix setting forth a listing of all pending proceedings and the status of each. This matrix would include those matters being addressed on delegated authority. The taxpayers should know what they are paying for.

Similarly, I suggest that we establish and release a schedule for the production of all statistical reports and analyses regularly conducted by the Commission, and publish annual updates of that schedule. This would include, for example: the *Wireless Competition Report*, which has traditionally been released each September; the *Video Competition Report*, which until recently, was released at the end of each year; and the *High-Speed Services Report*, which, at one point, was released biannually. Similarly, quite some time before your arrival, I went on record calling for giving the American public the opportunity to view and comment on at least a draft or outline of the National Broadband Plan. I look forward to working with you to increase public awareness regarding the status and substance of our work on this plan. The goal here would be not only to ensure that the public is fully aware of what we are working on and when, but also to give these valuable analyses to their owners – the American people – with regularity.

In the same vein, Congress, the American public and consumers, among other stakeholders – not to mention your fellow commissioners – would greatly appreciate it if notices of proposed rulemakings actually contained *proposed rules*.

Improve internal communication.

Also, we need to overhaul our internal information flow, collaboration and processes. I am eager to work with you, Mike, and our future colleagues, to identify and implement additional measures to increase coordination among the commissioner offices, between commissioner offices and the staff, as well as among the staff. It is important that we cooperate with each other to foster open and thoughtful consideration of potential actions well before jumping into the drafting process. The bottom line is simple: No commissioner should learn of official actions through the trade press.

An effective FCC would be one where, for instance, Commissioner offices would receive options memoranda and briefing materials long before votes need to be cast. For example, for all rulemakings, within 30 days of a comment period closing, perhaps all commissioners could

receive identical comment summaries. Also, within a fixed timeframe after receiving comment summaries, say 60 to 90 days, all commissioners could receive options memos complete with policy, legal, technical and economic analyses. In preparation for legislative hearings, it would be helpful if all commissioners received briefing materials, including witness lists, at least five business days prior to the hearing date. For FCC *en banc* hearings or meetings, we should aim to distribute briefing materials to all commissioners at least one week prior to the event date. The details here are less important than the upshot: all commissioners should have unfettered access to the agency's experts, and receive the benefit of their work. Again, I am grateful to Mike for his preliminary efforts in this regard.

Also along these lines, I hope that your team will reestablish the practice of regular meetings among the senior legal advisors for the purpose of discussing "big picture" policy matters, administrative issues, as well as to plan events and meetings that involve all of the offices. Given the numerous tasks we have before us, I trust you will agree that regular meetings among this group will improve our efficiencies, and go a long way toward lessening, if not eliminating, unpleasant surprises.

Just as important would be to hold regular meetings among the substantive advisors and relevant staff, including the Office of General Counsel. Having ample opportunity to review and discuss pending proceedings and the various options at the early stages of, and throughout the drafting process would allow us to capitalize on our in-house expertise early and often. Taking such precautions might also bolster the Commission's track record on appeal. Indeed, this type of close collaboration might lead to more logical, clear and concise policy outcomes that better serve the public interest.

Another idea is to update and rewrite our guide to the Commission's internal procedures, currently entitled *Commissioner's Guide to the Agenda Process*. For instance, just as Mike has done with respect to the distribution of our daily press clips, I propose that we undertake a thorough review of the physical circulation process, including identifying and making changes to reduce the amount of paper unnecessarily distributed throughout the agency. Current procedures require that each office receive about eight copies of every document on circulation when one or two would suffice. I also wonder why our procedures mandate delivery of 30 paper copies of released Commission documents to our press office. The overwhelming majority of reporters who cover our agency pull the materials they need from our website. Perhaps this is another area where we could save money and help the environment all at the same time.

Coordinate with other facets of government.

Finally, on a more "macro" level, I propose that the commissioners work together to build an ongoing and meaningful rapport with other facets of government, especially in the consumer protection, homeland security, and technology areas. I am confident that close collaboration with our government colleagues with similar or overlapping responsibilities would greatly benefit the constituencies we serve.

In closing, I again extend my warmest congratulations on your new position as Chairman. You are to be commended for the steps you have taken thus far toward rebuilding this agency. I look forward to working together with you, Mike and our new colleagues upon their confirmation to do even more.

Sincerely,

Robert M. McDowell

cc: The Honorable Michael J. Copps

Mr. WALDEN. Now we, for our final witness, turn to Commissioner Clyburn. We appreciate the time you have taken to engage in this matter with me and others on this committee, and we look forward to your testimony.

STATEMENT OF MIGNON CLYBURN

Ms. CLYBURN. Thank you, Mr. Chairman, for that and for inviting me to participate in today's hearing. It is my pleasure to see you, Ranking Member Eshoo and the other members of the subcommittee. I respectfully request at this time that my full statement be included in the record.

My colleagues and I work in an environment with many moving parts. As with any Federal agency, there are checks and balances in place, and the regulations and decisions we consider and adopt receive thorough consideration and incredible scrutiny. The Commission staff works diligently on each item with the objective of delivering a finished product that is cogent, precise, and effective. Such complexity often does not lend itself to rocket dockets and express reviews, yet the Commission has worked hard to streamline its processing of many items.

Other proceedings, however, require significant examination that takes time and an incredible amount of staff resources. Thus, our consideration of many rulemakings and adjudications can endure over weeks, months, and in some instances years. Part of the reason why many of our deliberations take so much time is because of our robust and all-inclusive public comment mechanism.

During our consideration of a rulemaking item, the Commission listens to any and all comers, petitioners, adverse parties, interested participants, the public, and so on. So criticisms about the FCC being sealed off from the public are inaccurate, I believe, and I am proud of our process and the number of public comments that stem from it.

We have made huge strides in putting an enhanced public face on the Commission under Chairman Genachowski's leadership. Through Reboot.FCC.gov, our external advisory committees, public forums, and the FCC's numerous workshops, we welcome, expect and, quite frankly, need voices and opinions from outside of our walls to provide feedback, criticism, and counsel. This is definitely not your grandfather's FCC.

Regarding our much-maligned sunshine rules, I have a particular interest and potential tailor-made revisions to the way in which we interact. The introduction of H.R. 1009 would be a significant improvement in our deliberative process, and I thank Ms. Eshoo, Mr. Shimkus and Mr. Doyle for this bill. Recently, NARUC, the national body representing State commissioners, praised the introduction of this legislation and offered its support for it.

Allow me to bring me to your attention the fact that NARUC did note the need for one minor change to the legislation in order to improve its effectiveness with respect to the Federal Commissioners' participation on the Joint Boards and Conference. The Joint Boards and Joint Conference have Federal and State representation, and each is involved in the Commission's policymaking process with respect to their subject-matter focus in the areas of universal service, jurisdictional separations, and advanced services.

Under current law, three or more Commissioners may not participate in a Joint Board or Conference meeting unless the meeting is open to the public and has been properly noticed.

Currently Federal Commissioners must take turns participating in our in-person meetings and conference calls. This has made it extremely difficult for a constructive, and effective and efficient deliberations when it comes to Joint Board-recommended decisions. NARUC's letter makes the same observation, and I join support of its request that H.R. 1009 include language to extend the proposed Sunshine Act's exemption to cover FCC Commissioners who participate on the Joint Boards and Conference.

I believe that it is critical that the FCC collaborate with the States on telecommunications and broadband policy. It is my belief that the understanding of local issues must be fully considered, and State commissioners know these needs best.

When I came to the FCC, my primary goal was to improve the communications and collaboration between our agency and the States. Fortunately, Chairman Genachowski offered me the position of Chair of all of the Joint Boards and Joint Conference. With his support I believe we have revitalized and strengthened the relationships with the States through these bodies.

Thank you again, Mr. Chairman, for another opportunity to appear before the committee. I hope that today's discussions will highlight any areas of concern that the members of this committee may have, be they process systems, agency rules, or any other methods of practice we use.

Mr. WALDEN. Thank you, Commissioner Clyburn. We appreciate your testimony and that of your colleagues on the FCC.

[The prepared statement of Ms. Clyburn follows:]

Testimony of FCC Commissioner Mignon L. Clyburn

Subcommittee on Communications and Technology
Committee on Energy and Commerce
May 13, 2011

SUMMARY

- The FCC is a complex environment; with innumerable requirements, proceedings, and moving parts that don't easily lend themselves to rocket dockets and express reviews.
- However, we strive to be as expeditious as possible with the items under consideration, but part of the reason why many of our deliberations take so much time is because of our robust and all-inclusive public comment mechanism.
- Through the FCC's website, our external advisory committees, our public forums, and the FCC's numerous workshops, we welcome, expect, and, quite frankly, need voices and opinions from outside of our walls, to provide feedback, criticism, and counsel.
- Any changes to the FCC's procedures should be conducted with an eye toward not restricting our deliberative process and our ability to take the time that we need to consider and resolve the complex items that come before us.
- We're working hard to reducing our backlog of applications, appeals, and complaints, and will continue to do so as expeditiously as possible.
- Regarding the possible reform of our Sunshine rules, I would ask that any potential language address the ability of three FCC Commissioners to participate on the Joint Boards and Joint Conference. It is crucial that as we consider how to reform FCC process, that we also think about how to improve our Joint Board and Joint Conference process.

Testimony of FCC Commissioner Mignon L. Clyburn

FCC Process Reform

Friday, May 13, 2011
House Committee on Energy and Commerce
Subcommittee on Communications and Technology

Thank you, Mr. Chairman, for inviting me to participate in today's hearing. It is a pleasure to see you, Ms. Eshoo, and the other Members of the subcommittee. I am looking forward to our exchange today.

The five of us work in a complex environment; with innumerable requirements, proceedings, and moving parts. As with any federal agency, there are safeguards—checks and balances in place, and the regulations and decisions we consider and adopt receive thorough consideration and incredible scrutiny. The commission staff works diligently on each item, with the objective of delivering a finished product that is cogent, precise, and effective.

Such complexity often does not lend itself to rocket dockets and express reviews; however, over the years, the Commission has streamlined its processing of many items, such as certain merger reviews, where there is no competitive overlap. Other proceedings, however, require significant examination that takes time and numerous staff resources, and thus our consideration of many rulemakings and adjudications can endure over weeks, months, and in some instances, years.

We strive to be as expeditious as possible with the items under consideration, but part of the reason why many of our deliberations take so much time is because of our robust and all-inclusive public comment mechanism. During our consideration of a rulemaking item, the Commission listens to any and all comers: petitioners, adverse parties, interested participants, the public, and so on. Like so many other entities, the FCC has embraced the use of social media, and the fact that we were the first federal agency to use it to gather comments for the public record is a tremendous milestone.

The criticisms about the FCC being sealed-off from the public are inaccurate from where I sit, and I am proud of our process and the number of public comments that stem from it. Through Reboot.fcc.gov, our external advisory committees, our public forums, and the FCC's numerous workshops, we welcome, expect, and, quite frankly, *need* voices and opinions from outside of our walls to provide feedback, criticism, and counsel.

We have made huge strides in putting a bigger public face on the Commission under Chairman Genachowski's leadership. Public meetings, workshops, and other FCC gatherings can be viewed live online, and the "reimagined" fcc.gov website is demonstrably more user-friendly and easier on the eyes. This is definitely not your grandfather's FCC.

The Commission has also taken steps to streamline and improve the everyday procedures and guidelines that govern various FCC interactions. We've increased transparency through reform of our ex parte procedures via the requirement for more

substantive filings. This Commission has also been attuned to prior complaints that our Orders are not released in a timely fashion, and has thus been focused on the quick release of orders following their adoption. We also have made strides in identifying and eliminating unnecessary and outdated regulations. We're working hard to reducing our backlog of applications, appeals, and complaints. For example our Media Bureau has greatly picked up the pace on clearing numerous pending broadcast applications, and that shows no sign of slowing.

With regard to our merger review process, I believe that the FCC's duty to examine proposed transactions under the public interest standard found in the Communications Act is proper and well-grounded. If a proposed marriage between two companies will enhance public interest goals like localism, competition, and diversity, it should receive the Commission's stamp of approval. This is a mandate that I take very seriously, and one that should be preserved. Our merger review process is structured to ensure that the combination of two companies does not result in harms to the public interest and, if it does, we may issue narrowly-tailored conditions toward improving the provisions of the merger. This is our statutory authority, and it is sound.

Regarding our much-maligned Sunshine rules, I have a particular interest in potential tailor-made revisions to the way in which we interact.

The introduction of the Federal Communications Commission Collaboration Act (H.R. 1009) would be a significant improvement in our deliberative process, and I thank Ms. Eshoo, Mr. Shimkus, and Mr. Doyle for its introduction. Recently, the National

Association of Regulatory Utility Commissioners (NARUC)—the national body representing state commissioners—praised the introduction of this legislation and offered its support for it. I would like to bring to your attention, however, the fact that NARUC did note the need for one minor change to the legislation in order to improve its effectiveness with respect to the federal Commissioners' participation on the federal-state Joint Boards and the Joint Conference.

The Joint Boards and Joint Conference both have federal and state representation, and each is involved in the Commission's policymaking process with respect to their subject matter focus in the areas of universal service, jurisdictional separations, and advanced services. Under current law, three or more Commissioners may not participate in a Joint Board or Joint Conference meeting unless they are open to the public and have been properly noticed. Currently, federal Commissioners must take turns participating in our in-person and conference call meetings.

This has made it extremely difficult for constructive and efficient deliberations when it comes to Joint Board Recommended Decisions. NARUC's letter makes this same observation, and I join in my support of its request that H.R. 1009 include language to extend the proposed Sunshine Act exemption to cover FCC Commissioners who participate on the Joint Boards and Conference. It is crucial that as we consider how to reform FCC process, we also think about how to improve our Joint Board and Joint Conference rules.

I believe that it is critical that the FCC collaborate with the states on telecommunications and broadband policy through the Joint Boards and Joint Conference process. Members of the state Commissions know their individual states' needs, and their input is key to our much-valued deliberative engagement. It is my belief that the expertise and understanding of local issues must be fully considered, and when I came to this Commission, my primary goal was to improve the communications and collaboration between our agency and the states. Fortunately, Chairman Genachowski offered me the position to chair all the Joint Boards and the Joint Conference, and with his support, I believe we have revitalized and strengthened the relationships with the states through these bodies.

In May of last year, for example, the Commission referred to The Joint Board on Universal Service a series of issues dealing with the reforming of the Lifeline program, which provides subsidized telephone service for low-income consumers. For six months, both federal and state members of the Joint Board and our respective staffs met regularly to discuss the record and to cooperatively draft a Recommended Decision, which it delivered for the Commission's consideration in November. The Commission has now issued a Notice of Proposed Rulemaking concerning the Joint Board's recommendations for reforming and modernizing Lifeline.

Likewise, the Joint Board on Separations has been meeting regularly to consider issues the Commission referred to it, and the Commission hosted a workshop on separations issues allowing both state and federal Commissioners of that Joint Board to hear directly from interested parties.

Similarly, in our Notice of Proposed Rulemaking on universal service and intercarrier compensation reform issued earlier this year, the Commission specifically requested state input on the issues we raised. We also offered state members of the Joint Board on Universal Service their own opportunity to submit comments in the proceeding, which they filed last week, and we hosted a workshop at FCC headquarters for them in February so that they could receive input from interested parties on the proposed reforms.

The Commission is holding a series of workshops on universal service and intercarrier compensation reform. State Commissioners have participated on panels in our two previous workshops, and next week the Commission will continue collaborating with the states in our final workshop that we are taking on the road to Omaha, Nebraska—the home of Commissioner Anne Boyle, one of our state members of the Joint Board on Universal Service. During the Omaha workshop, the Commission will focus on the federal-state roles in addition to long-term reform. I am proud that we have made great strides in strengthening our relationships with the states; that this agency is actively seeking input from the states; and that we are seeking to further collaborate with them. Of course, we could not have accomplished these improvements without the dedication and support of Chairman Genachowski, my fellow Commissioners, and the FCC staff, to whom I am very grateful.

As you consider FCC process reform, I would encourage you to also consider looking at the Paperwork Reduction Act, and how it could be improved to take into

account how agencies now engage with citizens. Like so many consumers today, agencies are also taking advantage of the technological revolution. For example, as I mentioned earlier, the FCC is using its website to inform consumers and industry of our proceedings and is providing facts on communications issues and tips on how consumers can resolve any problems they may encounter. Yet, to obtain voluntary feedback on our website, its usefulness, and how it should be improved, the PRA requires OMB approval to do so.

As a result, the Commission cannot be as nimble and responsive to users without engaging in a lengthy OMB approval process. Moreover, in order to delete questions from FCC forms or to add an electronic filing feature for a form, OMB approval is required. So even when we lessen the collection burden or add an electronic filing option, OMB approval must be sought. The PRA's purpose to measure the burden imposed on government collections and ensure that they comply with the PRA is an important goal; however, it's time to consider how it should be reformed and modernized to take into account how government interacts with its citizens today.

Thank you again, Mr. Chairman for another opportunity to appear before the subcommittee. I hope that today's discussions will highlight any areas of concern that Members of this subcommittee may have, be they process systems, agency rules, or any other methods of practice we use. I look forward to the chance to address any issues you care to discuss.

Mr. WALDEN. I want to start with a question regarding the Commission's agenda. I understand the Chairman is agency CEO, controls the Commission's agenda. I have a question, though, that a Chairman could prevent the FCC from addressing important issues even when a bipartisan majority of the Commissioners believes that moving forward is necessary.

So I would like each of you to answer, do you believe that a bipartisan majority of the Commissioners other than the Chairman should be allowed to work with the agency staff to move an item?

Commissioner—we will start with the Chairman.

Mr. GENACHOWSKI. Well, having a collaborative process has been important to me from the start, as I mentioned, and I appreciate the collaborative way that all of us have worked together. I can't imagine a situation——

Mr. WALDEN. I am going to keep you kind of short here because I have got a series of questions. But again, this isn't about you, and it is not about this Commission, because things have changed. They can change again.

So the question is should you be able to be allowed to work with the agency staff to move an item? Should the other Commissioners?

Mr. GENACHOWSKI. I think the statute now is correct on this. I think any organization needs a chief executive responsible for the prompt——

Mr. WALDEN. So it is a no.

Commissioner Copps.

Mr. COPPS. Yes, I do. I believe the three Commissioners should have the power to call up an item, to delete an item from an agenda, and to edit any and all documents.

Mr. WALDEN. Commissioner McDowell.

Mr. MCDOWELL. This is another boring chapter in the long, multivolume set known as the Copps-McDowell alliance. I agree with my colleague to the right of me, ironically.

And so, yes, we actually, in all seriousness, in the fall of 2008 could have resolved a lot of thorny questions on universal service reform, intercarrier compensation because there were four Commissioners, two Republicans, two Democrats, in agreement, but the Chairman at the time did not move the item.

Mr. WALDEN. Thank you.

Commissioner Clyburn.

Ms. CLYBURN. We are the sum total of our experiences, so in that regard, I have healthy engagement, and at this time I don't see any need for any revisions in that manner.

Mr. WALDEN. OK.

Mr. GENACHOWSKI. Could I add just one other thing? Ninety-five percent of what we do is unanimous. Historically this hasn't been a problem except for, as far as I can tell, one anomaly. And so I personally think that changing the statute to address one anomaly when it hasn't been a problem, I can't imagine an incidence when it wouldn't be three Commissioners for a step that we couldn't work out together.

Mr. WALDEN. Commissioner Copps?

Mr. COPPS. This reminds me of the old story from history when Abraham Lincoln was meeting with his Cabinet to discuss a very

serious issue, and he took a vote, and there were three noes from the Cabinet. And then he voted, and he said, the ayes have it.

Mr. WALDEN. That is why I thought I would ask the Commissioners, not the Chairman, and those who had been there during other times. Appreciate it.

Commissioner McDowell, you mentioned in your written testimony that the FCC should include proper market power analyses to justify new rules or else explain why such analyses are inappropriate. Could you elaborate on your views, and would you agree that performance measures for regulators should be built into the process for adopting new regulations so that the public can monitor whether the purported benefits for regulation actually play out?

Mr. MCDOWELL. Sure. One assumes that if a new rule is going to go in place, it is because something is not working in the market. So why is there not something working in a market? So a market power analysis, I think—and a proper market power analysis, I think, is warranted. Now, there may be good reason why a market power analysis is not needed, but the Commission should then be required to explain why it is not doing a market power analysis.

Mr. WALDEN. Commissioner Copps, do you care to comment on that?

Mr. COPPS. Well, I think that is one argument. I suppose the other side of the argument is that that is why we have notice and comment and the ability of all parties to explain the advantages and disadvantages of a situation.

I think we should be doing basic economic analysis. I think in all the cases that I have seen under this Commission, we have probably done more of that than we have done in any of the other Commissions that I have been a part of. Whether you put that in a package and call it market power analysis and differentiate it from all of that other stuff, I don't know. I would vote to have a little more flexibility than that.

Mr. WALDEN. Commissioner Clyburn?

Ms. CLYBURN. I would be open to this type of engagement and conversations, but to my knowledge, a lot of this, whether it is labeled so or not, is happening within the bureaus. So I think we are having the benefit of some of the engagement even if it is not called that.

Mr. WALDEN. Chairman Genachowski.

Mr. GENACHOWSKI. As a general matter this is what we do. The APA requires us to consider all arguments presented to us, and we certainly get arguments about market issues. Affirmatively it is something we can and should do. There are cases when the reasons stacked are different. If it is public safety regulations, disabilities, rules, et cetera, it doesn't make sense. But in any situation where what we are doing is designed—where it would make sense, we do it; we do it as a matter of practice, and the APA would require us to do it.

Mr. WALDEN. My time has expired, and I turn to my colleague from California, Ms. Eshoo, for 5 minutes.

Ms. ESHOO. Thank you, Mr. Chairman.

I thank the Chairman of the Commission, and the Commissioners, for your testimony and your ideas. I want to congratulate you for what you have already done. It really should not be skipped

over. I took a look at your new Web site last night. I think it is hot. I really do. I recommend it to others as well.

First of all, is there anyone on the panel here today that does not support the legislation for improving the decision-making process at the agency, the legislation that myself and Mr. Shimkus and Mr. Doyle have introduced?

Mr. GENACHOWSKI. I would just emphasize two things if I could. One is the importance of making sure——

Ms. ESHOO. First, tell me yes or no.

Mr. GENACHOWSKI. No, I am supportive of it as long as it preserves the transparency goals underlying the sunshine act originally. And I think the joint board issue is one where I would certainly support a measure that would take care of that issue. It is really a conflict between two statutes that doesn't make sense.

Ms. ESHOO. In California we have had the Brown Act for years and years that has, I think, really served the public interest very well. So I appreciate that. But it is good to know that there is across-the-board support.

To Chairman Genachowski, in response to my posthearing questions from our February 16 meeting, you indicated that a proceeding is underway to determine whether the FCC's special access rules are ensuring that the rates, the terms, and the conditions for special access are just and reasonable. Are there procedural changes in the way that the FCC operates that could speed up this process?

Mr. GENACHOWSKI. I am not sure there are. We have heard many complaints about the special access area. When we started looking into it in my time there, we realized that the data that the Commission had was really—provided no real basis to actually make a judgment or support actions.

But we are in the middle of a process now to collect the data we need. I think that is proceeding on schedule. I will go back and look at whether there are procedural changes that would be helpful, but I think we have the procedural flexibility to do what we need to do.

Ms. ESHOO. Again to the Chairman, I understand that there is often resistance from industry to provide the data necessary to fulfill the Commission's goal of serving the public interest. What are the roadblocks to obtaining this data and how can we assist you in ensuring that you have the data needed to preserve competition and consumer choice?

Mr. GENACHOWSKI. It is an important topic because we are all committed to having the FCC be an agency that is about facts and data. You can't be an agency about facts and data without data.

What we have tried to do over the last 2 years, with the help of the committee, is look both at old data collection requirements that are outdated, that can be eliminated, and also making sure that we are getting the data that we need in this new world. So by removing data, we are showing, I hope, establishing credibility that we are focused only on what we really need to do.

Ms. ESHOO. Do you need us to help you do that?

Mr. GENACHOWSKI. I am not sure if we need rules changes, but I think your interest in making sure that we have the data that we need and supporting us in this effort is helpful.

Ms. ESHOO. Good. Does the Commission collect statistics on wireless network quality and reliability? For instance, do you have data relative to dropped calls?

Mr. GENACHOWSKI. On dropped calls, we actually built and distributed an app to begin to get information from consumers.

Ms. ESHOO. So you are just starting that?

Mr. GENACHOWSKI. So we are just starting that. It is a new thing. I agree, it is an area we should look at.

Ms. ESHOO. Good. Commissioner Copps mentioned in his testimony the value of holding field hearings, and I know that there were to examine the Comcast-NBC merger. Do you plan to hold similar field hearings on AT&T and T–Mobile?

Mr. GENACHOWSKI. In general, we have done a number of field hearings. We will continue to do them. We will be in Nebraska next week on universal service reform. We have been in many States.

Ms. ESHOO. Do you plan to do them on this gigantic merger?

Mr. GENACHOWSKI. We haven't announced the hearing schedule, so if I can get back to you once we do that.

Ms. ESHOO. I would urge you to do it because the public needs to come to these hearings and understand what is at stake for them and ask you questions about what is going into this decision. They are the ones that are going to be affected by it. Here inside the Beltway, it is like gossip city, who said what and how fast it is going and how slow and why and all of that. And it is sexy inside the Beltway. But for people out there, they want to know how is this going to affect my rates.

Mr. GENACHOWSKI. I agree.

Ms. ESHOO. These are becoming expensive utility bills. It is important for you to hit the road.

Thank you, Mr. Chairman.

Mr. WALDEN. Thank you, Ms. Eshoo.

Just one quick question. There is nothing in statute that precludes you from doing the public hearings you've talked about; right? You don't need that from us?

Mr. GENACHOWSKI. I don't think so.

Mr. WALDEN. I turn now to Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Thank you for coming. I am bouncing between two committee hearings, one with the EPA on rules and regs. I want to make sure, this is on process reform, and sometimes we will get jumbled in on what is going on and think a process reform may solve it, but we really want to stay on what can we do to transparency and the like.

Commissioner Clyburn, I appreciated the example, and we get e-mail, too, from NARUC on extending that, and I think that is a good idea and something that should be included. But it gave me a question for the Commissioners, and Chairman, you can weigh in too, if you would like; the Commissioners specifically highlighted our piece of legislation as being beneficial.

Can you give me an example how that would be helpful? Especially Commissioner Copps, you have been around a long time. You probably have a few stories, like we did just prior. Give us some real-world application why you think this would be helpful.

Mr. COPPS. Well, a joint board example like Commissioner Clyburn was talking about, we will have a conference call and Com-

missioner Clyburn and Commissioner Baker and myself are each members of that board, but we cannot be on at the same time. So, say Commissioner Baker is on for the first 10 minutes. Then we say, well, Commissioner Baker, you have to get off; Commissioner Copps is getting on, and then it goes back and forth. So you really interfere with and retard the discussion.

But even going beyond that, I think there is something to be gained by the synergies of having five individual people chosen with five different skill sets, vetted by the White House, confirmed by the Senate, to come to the Commission and to just have them sit down in a room together. I think some of the personality conflicts that we have had in previous Commissions, and I don't want to overdramatize them or anything like that, but I think things would have gone better and been more easily resolved and more of the spirit of compromise and collegiality would have attended those issues had we been able to do that. I don't understand why we are not able to do that.

Mr. SHIMKUS. Mr. McDowell.

Mr. MCDOWELL. Yes, I agree. So to go back to that fall of 2008 example with the universal service intercarrier compensation where four Commissioners—again, two Republicans, two Democrats—agreed on some fundamental reforms, it would have been nice if all five of us could have gotten into a room, or three of us, to try to figure out why that wasn't moving. So I think it would speed the process.

I think it would be more efficient, as Commissioner Copps said, it would breed more collegiality. And keep in mind, our work product ultimately is public and appealable to the courts if someone doesn't like it, so transparency is still there.

Mr. SHIMKUS. Commissioner Clyburn?

Ms. CLYBURN. Coming from a joint board perspective, you have already heard how inefficient the process, the current process is. To give the public some assurances or some more comfort in this, when we talk about the joint board and joint conference, joint boards and joint conference experience, the recommended decisions from these bodies are not final. They are recommended decisions, and they are presented to the FCC, and then at that point there is a notice, the process of noticing goes into place. Then and only then, after that is exhausted, that comes to the FCC for a decision. So these are not final. Recommended decisions are not final decisions. They go through processes, so the public should feel some comfort. But this disconnect that we have is something that does not lend itself for a good exchange.

Mr. SHIMKUS. Mr. Chairman, do you want to weigh in?

Mr. GENACHOWSKI. I agree that the joint board situation is a problem that should be fixed.

Mr. SHIMKUS. Another process reform, and it is kind of the age-old argument that people raise capital, assume risk, and need some certainty whether to either produce or to withdraw from the market. Some people have proposed issues like shot clocks as far as time lines, minimum review periods after the close of a comment cycle. Does anyone have to talk about that? And I only have 34 seconds, so do it quickly.

Mr. GENACHOWSKI. I think in general, shot clocks can be an effective management tool. They are one of the tools that we use. I think preserving flexibility is important; but I think it can be an effective management tool.

Mr. COPPS. I would agree. I think sometimes shot clocks, such as accompanied the Comm Act that we are looking at now, do mandate that we take action. Again I think this Commission is doing a good job generally on this score, so I don't know that we would have to mandate it unless the problems got a lot worse. I do agree that business needs certainty, but I think that comes more from the substance of the rules than the process, and having a clear idea of the rules that they are going to operate under.

Mr. SHIMKUS. Commissioner McDowell?

Mr. MCDOWELL. I think shot clocks can be very helpful. I have long advocated them. I do agree with the Chairman that we need to preserve some flexibility. Things can go wrong. Sometimes we get a shot clock from Congress, with the Comm Act or the Telecommunications Act of 1996; but internally, we probably could use more.

Ms. CLYBURN. In principle I am not in disagreement with shot clocks; but I think they should be treated as guidelines and not be allowed to rule the process.

Mr. SHIMKUS. I thank you all. I yield back the balance of my time.

Mr. WALDEN. We now go to Dr. Christensen for the next 5-minute round.

Mrs. CHRISTENSEN. Thank you, Mr. Chairman, and welcome to you, Mr. Chairman, and the other Commissioners. From the outset, I want to make it clear that I know my question regarding FCC's review of mergers and transactions is an issue of authority and not one of process. It is clear that Congress created a strong public interest mandate for the FCC. As Commissioner Copps noted, the words "public interest" appear 112 times in the Communications Act. The FCC has clear statutory authority under the act to conduct its public interest evaluations of mergers and transactions, and the courts have conferred great leeway for the agency to fulfill these public interest duties.

Commissioner McDowell, I wanted to ask you whether you agree with the statement made by Commissioner Baker in March that the FCC has "clear statutory obligation to closely scrutinize transactions and reject those that violate the Communications Act, FCC rules, or fail to serve the public interest"?

Mr. MCDOWELL. Yes, I agree with that.

Mrs. CHRISTENSEN. Does everyone agree with that statement?

Mr. GENACHOWSKI. Yes.

Mrs. CHRISTENSEN. Chairman Genachowski, why do you believe that the FCC should have jurisdiction over transactions? Why wouldn't DOJ or FTC review be sufficient?

Mr. GENACHOWSKI. Well, the Communications Act makes it clear that the FCC must approve transfers of communications license and find that they are in the public interest in order to do so. Communications is something of importance to every American. It is a sixth of our economy. They involve complex technical issues where an expert agency is important, other goals and values that are en-

shrined in the Communications Act, and that has been our system for many, many years and it is important to make it work effectively.

Mrs. CHRISTENSEN. Some have complained that in reviewing some of the mergers, the FCC has imposed conditions that are not transaction-specific. For example, during the review of the Comcast-NBC Universal transaction, conditions involving broadband adoption and diversity were imposed. Do all of you believe that those conditions are merger-specific? Mr. Chairman?

Mr. GENACHOWSKI. Yes. If I can add one word, the statute requires the FCC to make a determination that a transaction is in the public interest. So it is not surprising that companies, as they come to the FCC and file for approval, make the case for why a transaction is in the public interest and point to specific public interest benefits. With respect to some of the benefits, given the potential harm of some transactions, it becomes important to make sure those commitments are binding.

Mrs. CHRISTENSEN. Commissioner Copps?

Mr. COPPS. Yes, I agree very much that conditions on transactions are perfectly within the purview of the Commission. I know there is an argument whether they should be company-specific or products of industrywide rulemaking. But that is a hard line to draw. Some of these transactions, like Comcast and NBC, are paradigm shifting. They change the whole industry, so it is very difficult to make a clear division, like some people would have us make.

Mrs. CHRISTENSEN. Commissioner McDowell?

Mr. MCDOWELL. I do not believe conditions should be imposed that are not merger-specific. I think in that particular transaction, there were a number of conditions or voluntary commitments that were not merger-specific. They might be evidence of good corporate citizenship, or evidence that they wanted to try to sweeten the deal for FCC's approval, but some of them had nothing to do with the merger itself.

Mrs. CHRISTENSEN. Commissioner Clyburn?

Ms. CLYBURN. I agree in terms of the public interest standard that the FCC is basically mandated to do that. We are the experts in this space. We not only are required to look at competition, which is solely DOJ's purview, but we have to look at the public benefits, and that includes a number of benefits as well as harms, and we have to weigh those, and conditions are sometimes warranted to answer those.

Mrs. CHRISTENSEN. Let me just ask a question of Chairman Genachowski in my last few minutes.

You talked about holding a public forum on reducing barriers to broadband and band buildout, and we really commend all of you for the forums that you have held. These events are important to the successful implementation of States and territories, for example like the U.S. Virgin Islands.

Are there some barriers that you have identified to broadband buildout and is there technical assistance that FCC would provide to overcome any of those barriers?

Mr. GENACHOWSKI. There are barriers. Some of the barriers that we see are barriers that slow down infrastructure companies, wired

and wireless, from building out quickly or that add costs. We took some steps in this area around tower siting; shot clock, to come back to the shot clock concept, we adopted one. We took steps in this area also with respect to pole attachments which will help reduce costs and lower the cost of broadband buildout.

We are very interested in hearing from industry and stakeholders on other barriers that would be appropriate to address. One that has been brought to our attention are challenges around co-locating antennas on existing towers and unnecessary delays in that process. So that is something we are looking into now

Mrs. CHRISTENSEN. Thank you.

Mr. WALDEN. I turn to the gentlelady from Tennessee, Mrs. Blackburn, for 5 minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman.

Commissioner McDowell mentioned an article by Randolph May, and, Mr. Chairman, I would like to submit that article for the record. I agree with the Commissioner. I read it and I thought it was very insightful.

Mr. WALDEN. Without objection.

[The information follows:]

Rolling Back Regulation at the FCC: How Congress Can Let Competition Flourish

By: Randolph J. May*
April 18, 2011
National Review Online

Though competition and consumer choice now pervade almost all segments of the communications market, the Federal Communications Commission has done little to eliminate regulations that were adopted in the days when Ma Bell and three television networks dominated the landscape.

In fact, not only has the FCC failed to eliminate many regulations that are no longer necessary, it continues to add burdensome new ones. As a prime example, witness its adoption last December of new "net neutrality" regulations that govern the practices of Internet-service providers, even though the agency made no findings of present market failure or consumer harm.

Congress should force the FCC to get rid of unneeded regulations. There is a way it can do so rather surgically.

In 1996, Congress amended the Communications Act, which was originally adopted in 1934, to take account of the developing marketplace competition as telephone companies, cable and satellite operators, and mobile-phone firms began to invade each other's turf. Anticipating that this trend would continue, Congress stated right in the new statute's preamble that it intended for the FCC to "promote competition and reduce regulation." And, in the principal legislative report accompanying the 1996 act, Congress stated its intent to provide for a "de-regulatory national policy framework." It could have been more specific, but there is no mistaking that Congress thought it was adopting a statute - the most significant change to the Communications Act since its enactment in 1934 - with a deregulatory thrust.

In other words, Congress concluded, correctly, that the development of more competition and more consumer choice should lead to reduced regulation.

In the 15 years since, as anticipated, marketplace competition has continued to develop dramatically. But the FCC has not done nearly enough to "reduce regulation" and provide a "de-regulatory" policy framework. There may be various explanations, including bureaucratic inertia and regulatory capture, as to why this is so. Whatever the reason, the point is that a deregulatory fix is needed.

A simple regulatory reform measure could be adopted now to better effectuate what Congress intended to be the 1996 act's deregulatory tilt.

The 1996 act introduced into the Communications Act two related deregulatory tools, tools that are generally not found in other statutes governing regulatory agencies. The first provision states the commission "shall forbear" from enforcing any regulation if the agency determines it is not necessary to ensure that telecommunications providers'

charges and practices are reasonable, or necessary to protect consumers or the public interest.

The second requires periodic reviews of regulations so that the commission may determine "whether any such regulation is no longer in the public interest as a result of meaningful economic competition between providers of such service." The agency is required to repeal or modify any regulation it determines to be no longer in the public interest.

These provisions obviously were added to the Communications Act as ways to reduce regulation. Nevertheless, the FCC has utilized them only sparingly and fitfully. In its forbearance and regulatory-review rulings, the agency generally takes a very cramped view of evidence submitted concerning marketplace competition - for example, refusing to acknowledge that wireless operators compete with wireline companies, or that potential entrants exert market discipline on existing competitors.

Congress should amend the Communications Act to make the forbearance and periodic-review provisions effective deregulatory tools. It can do this by adjusting the burden of proof: The FCC should be required to presume, absent clear and convincing evidence to the contrary, that the consumer-protection and public-interest criteria have been satisfied. Those seeking to retain regulations would be required to make a case. The FCC might seek to ignore or skew evidence in order to make this change irrelevant, but its decisions are subject to review by the courts.

This past January, President Obama issued an executive order directing agencies to review existing regulations to determine whether they are "outmoded, ineffective, insufficient, or excessively burdensome." Adoption of the proposal offered here is not only consistent with this order, the record shows that, with respect to the FCC, it is required if the injunction is to have any real meaning.

This proposal would not lessen the need for comprehensive reform of our communications laws. But it would go a long way toward eliminating, to use President Obama's words, "outmoded, ineffective, insufficient, or excessively burdensome" FCC regulations.

And, after all: Isn't that the very same reason that Congress added the forbearance and periodic-review provisions to the Communications Act in 1996?

**Randolph J. May is President of the Free State Foundation, a non-partisan Section 501(c)(3) free market-oriented think tank located in Rockville, Maryland. This essay was published in the National Review Online on April 18, 2011.*

Mrs. BLACKBURN. Chairman Genachowski, I want to ask you, looking at the process you followed on net neutrality, I want to ask you about a Fortune magazine article, and you have affirmed in that article two different times that net neutrality rules were already in effect; so are these rules in effect?

Mr. GENACHOWSKI. I think I may have been making the point that on a bipartisan basis, before I got to the Commission, the Commission had enforced net neutrality rules against companies. Rules were just part of the problem.

Mrs. BLACKBURN. I hate to interrupt you, but I think what the reporter said, that means they are law. These are rules that have been written and are in effect. And your response was "yes."

What is interesting to me is that the FCC hasn't published the order in the Federal Register yet. So my question would be: What justification could there be for a 6-month wait or a delay unless the FCC is seeking further delay and legitimate rules by the courts or by Congress?

Mr. GENACHOWSKI. I understand your question now. The rules are not in effect yet. They require publication in the Federal Register, and they have to go through an OMB process and a Paperwork Reduction Act process. These are not our processes. We are complying with the processes as quickly as we can.

Mrs. BLACKBURN. Yes, I agree, and I think it would be appropriate to get our policies published in the Federal Register before we start implementing new rules, especially since the impact that those rules are going to have are, in my opinion, going to be damaging to the innovation and growth of the Internet.

Let's look at the Comcast-NBCU order. It states that the Comcast and NBCU shall comply with all relevant FCC rules adopted by the Commission in GN docket No. 09–191, and I am referring to the FCC's Open Internet order and its unique application, this specific, on the merger conditions. Does the FCC believe that even if a court overturns the FCC's decision, that Comcast and Comcast alone will still be subject to these ex-judicial rules, and where does the FCC get that authority?

Mr. GENACHOWSKI. The answer is yes. The authority comes from the language obliging us to make a public interest determination in approving transactions. This was a merger-specific enforceable commitment that came out of the fact that this was a merger between the largest broadband company in the country, one of the largest content companies. We heard from many businesses saying that a specific harm from this transaction could be favoritism of some content over others.

Mrs. BLACKBURN. Does the FCC have a responsibility to answer to the article 3 courts that by law review the FCC decisions?

Mr. GENACHOWSKI. Of course.

Mrs. BLACKBURN. OK. Let's talk about copyright protection. I support it, and I have supported voluntary cooperative efforts among the ISPs and content community to address infringement. And given the language specifically in paragraphs 107 and 111 of your open Internet order, what assurances can the FCC give to the ISPs that they can enter into voluntary agreements with copyright owners to address these infringements online without running afoul of the net neutrality order?

Mr. GENACHOWSKI. My recollection is that the order says pretty much that. That the rules apply only to lawful content, not unlawful content like stolen intellectual property, and that voluntary agreements to make enforcement of IP laws effective is something that is not prohibited by the rule.

Mrs. BLACKBURN. I have to tell you, I think it would be helpful for the FCC to provide the companies assurances that they have reasonable discretion to address copyright infringement, and I hope that you will do that.

Mrs. BLACKBURN. I only have 19 seconds left. I had another question about broadband pricing, but I will submit that for a written response.

I yield back.

Mr. WALDEN. We will get an answer from each Commissioner.

Mr. Doyle has been kind enough to yield to the chairman emeritus of the Energy and Commerce Committee, Mr. Dingell.

Mr. DINGELL. Mr. Chairman, I thank you for your courtesy, and I thank you for the recognition. And I want to thank my good friend from Pennsylvania. There are many, many courtesies I have had at his hand.

Commissioners, welcome to the committee. I want to express some distress at the delay in publication of the Commission's Open Internet order in the Federal Register. I understand, and clearly so, that this delay is more appropriately attributed to the Office of Management and Budget than to the FCC.

Moreover, I wish to note for the record that the order was adopted on December 21, 2010, and the order's text was released to the public 2 days later on December 23. I want to commend the Commission for this display of transparency.

There is, however, another type of delay that deprives the public of a thorough understanding of the Commission's decisions, and it does I think afford a marvelous opportunity for rascality. This is the delay that can occur between the time when the Commissioner adopts the report and order, and the date on which the text of that report and order is released to the public. A delay of this sort enables the staff to make revisions to the order in the dark of the night. It enables petitioners to seek and obtain tweaks in the agency's language. It is a decision-making that is subject to the charge that it is potentially the source of perhaps dishonest decision-making that ought not exist at the Commission.

This type of delay has been the subject of this committee's attention in the past. As the Chairman and I were discussing yesterday, some 20 years ago in May of 1991, I engaged in an exchange of letters with the then-Commission Chairman Al Sikes.

Mr. Chairman, I ask unanimous consent that copies of that correspondence be entered at this point in the record.

Mr. WALDEN. Without objection, so ordered.

[The information follows:]

U.S. House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515

May 1, 1991

The Honorable Alfred C. Sikes
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Chairman:

Thank you for your letter of April 19, regarding the Commission's statutory basis for voting on a description of rules, rather than on a draft report and order. I appreciate your comments regarding the disruptive nature of this particular rulemaking. Given the public nature of much of that disruption, I can attest that your characterization is accurate.

As you noted in your letter, the Communications Act gives the Commission considerable latitude in the conduct of its proceedings and the publication of its decisions. But while the statutory and case law at present may permit the Commission to conduct its proceedings and announce its decisions on the basis of a 23-page executive summary, that does not mean that the Congress can expect these procedural methods to result in decisions that are both sound in their policy choices and rigorous in their analysis.

The rulemaking process in which the Commission engages is, in essence, a legislative proceeding. In contrast to the procedure utilized by the Commission when it made its decision, when Congress votes, it votes on a specific legislative text. Any changes to that text must be ratified by separate votes on amendments, and even staff technical corrections are reaffirmed by the vote of the House or Senate. This procedure helps to assure that specific provisions are clearly understood, and that each Member of Congress is as well informed as possible when the vote takes place.

I recognize that the requirements of the Government in the Sunshine Act constrain the ability of the Commission to discuss and craft proposals for its decisions prior to Commission meetings. And it is not my desire to see the Commission adopt -- or be forced to adopt -- procedures that would slow the

decisionmaking process, or that would have an adverse effect on the ability of the Commission to do its job. That concern weighs heavily against any of the obvious remedies to improve the agency's decisionmaking process.

On the other hand, when the Commission makes its decisions based on something other than a draft report and order, or when extensive and substantial modifications to a draft are made during the course of the Commission's deliberations, the release of a final report and order is inevitably delayed indefinitely. I noted with interest, for example, that the final Report and Order on the children's television rulemaking was released within a week of the Commission's meeting. It is not yet clear when the final report and order concerning the Network Syndication and Financial Interest Rules, which was adopted on the same day, will be released.

I remain concerned that the Commission's decisionmaking process is impaired when Commissioners do not have the text of a draft report and order before them when they make their decisions. While I am reluctant to suggest the imposition of such a requirement, I would like to request that you, and each of your fellow Commissioners, address the issues raised in this letter.

I would also ask that the Commission staff prepare a list of the agency's decisions over the past five years in which the text of the decision was released more than 30 days after the Commission held its public meeting, together with an explanation for the delay. Any delay of more than 30 days indicates that substantial rewriting of the final report and order is taking place after the Commission issued a public announcement of its "decision", and such a list would be very helpful to the Committee's oversight efforts.

I look forward to hearing from you. I would appreciate receiving your response by May 17.

Sincerely,

JOHN D. DINGELL
CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

May 20, 1991

OFFICE OF
THE CHAIRMAN

Honorable John D. Dingell
Chairman, Committee on Energy and Commerce
House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter regarding Commission procedures for the adoption and release of decisions made at Commission meetings. At your request, we have enclosed a listing from 1986 through present of the documents released more than thirty days after the Commission meeting and the reason for the delay.

We believe it is critical to the integrity of the decision-making process that before a vote all Commissioners have a document that sets forth the proposed action in detail and explains the record analysis and rationale underlying that action. We as a Commission are confident that such items have been presented to the Commission before almost every vote that has taken place since we have been Commissioners. In most instances before a vote, the Commission has had before it an item needing only minor editorial changes. In the few instances where the item before the Commission when it votes has not been a complete draft order, it has nevertheless been quite clear to the Commissioners what they were deciding and on what basis.

Although the Commission normally has a draft order before it when it votes, we believe it is important to retain the flexibility to vote on rare occasions without a draft order, provided there is a document that clearly establishes what the item is and clearly describes each provision being adopted and the rationale for it. Although a decision to vote without a final order may result in some additional delay in releasing an order, that delay is usually outweighed by a determination that the public interest in these rare instances is better served by a prompt announcement of the Commission's decision on a matter of vital importance. In the financial interest/syndication proceeding, for example, the 23-page summary before the Commission when it voted stated explicitly each rule provision being adopted and the rationale for it.

Turning to the future, the Commission recently completed an extensive, year-long project to revise the policies and procedures governing the Commission's entire agenda process. This project significantly improved, for the first time in over eight years, the writing of Commission agenda items.

The Commission's new procedural guidelines state that the Bureau or Office that drafted the item is responsible for making all requested editorial changes after a vote. Edits requested by the Commissioners must be approved by all Commissioners before the Bureau or Office submits the item to the General Counsel for final, pre-release legal review.

We share your concern with the number of Commission items that are released more than thirty days after a public meeting. The public is entitled to know the details of a Commission decision promptly after it is made. The Commission, as you know, releases on the day of each meeting a public notice that gives a detailed summary of each item on the Commission agenda. This notice includes a name and phone number of the bureau staff person assigned to that item. Unfortunately, however, the delay in releasing the final written order or notice is the result of the administrative process of incorporating the final edits of all those involved in the decision-making and drafting process. This has often taken more time than is desirable. While the reasons for delay in the release of specific items may vary, the delay generally reflects this fact. The delay does not reflect any significant substantive changes, after the Commission's vote, in the specific action taken by the Commissioners.

One of our goals has been to improve the efficiency and public responsiveness of the Commission, and we believe we have been successful in doing so. As reflected on the enclosed list regarding items released more than thirty days after a meeting, there has been steady improvement in this area, although not as much as we will achieve. We can assure you that we are committed to further speeding up this process. While achieving this goal will require increased effort, we are confident that the Commission can continue to reduce substantially the time it takes to release items. The Chairman and Commissioners will continue to discuss mechanisms for achieving better cooperation and efficiency in the release of items.

Sincerely,

Alfred C. Sikes
Chairman

James H. Quello
Commissioner

Sherrie P. Marshall
Commissioner

Andrew C. Barrett
Commissioner

Ervin S. Duggan
Commissioner

Enclosure

U.S. House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515

May 21, 1991

The Honorable Alfred C. Sikes
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Chairman:

Thank you for sending me the list of Commission decisions that were released more than 30 days after they were adopted by the Commission. I think you will agree that the list can correctly be characterized as extensive, and that in some cases, the delays were unjustifiably long.

The text of the letter signed by all five Commissioners, together with the additional letters submitted by two of your colleagues, appears to indicate a concern that a deadline on the issuance of Commission decisions could impede the decision making process. I will not cavil with that conclusion. I also recognize the impact that the "Sunshine Act" has had on the ability of a majority of Commissioners to direct the process of drafting orders prior to their adoption by the Commission.

At the same time, however, and as you noted in your letter, the public is entitled to know the details of a Commission decision promptly after it is made. While it may be possible to justify extensive delays for individual decisions on a case-by-case basis, the list you provided me included 157 instances in which the Commission's decision was released more than 30 days after it was made.

The concern about the length of time that the Commission takes to release its decisions is not a new one. In H.Rept. 100-363, at page 5, the following paragraphs appear:

The Committee notes that, in many instances, the length of time between the Commission's adoption of an item at a public meeting and the subsequent release of the text of the Notice or Order pertaining to that item has been inordinately and unacceptably long. The failure of the Commission to release final texts more expeditiously has placed a burden on parties to proceedings before the Commission and the public, who often have to wait extraordinarily long periods of time for the publication of the item to determine the full ramifications of a Commission action.

The Commission's failure to release the final text of adopted items also could have the consequences of hampering the ability of the Congress to fulfill its statutory obligation to oversee Commission activities. Therefore, the Committee directs the Commission to release texts in a more expeditious and timely fashion. The Committee notes that the Commission has demonstrated the ability to release expeditiously texts of those items it considers of particular importance. Thus, it is clear the Commission is capable of improving its performance in this area. The Commission, therefore, is directed to deliver to the printer for publication the final texts of Commission Notices, Orders and all other items which the Commission has considered in a public meeting by 5:00 p.m. on the last business day of the week in which the item is considered or adopted by the Commission.

It is clear from the list you provided in your letter that the directives contained in this Report have not had the desired effect upon the Commission's procedures and practices. However, I would also note that there appears to be an improvement in the timely release of Commission decisions, for which I commend you and your fellow Commissioners.

Moreover, it is clear that at least some of the delays listed are attributable to lack of resources. It is my hope that the Commission's budget will be increased to an amount sufficient to eliminate delays attributable to inadequate funding.

At this time, I have no specific plans to address this situation through the legislative process. However, it would be useful to the Committee for the Commission to inform us of each decision that is released more than 30 days after its adoption by the Commission, and the specific reasons for the delay. Accordingly, I am writing to ask that, until further notice, you provide the Committee with this information.

Thank you for your attention to this request, and for your cooperation throughout this process.

Sincerely,

JOHN D. DINGELL
CHAIRMAN

Mr. DINGELL. With this history in mind, I am going to direct this question to you, Chairman Genachowski, and I am going to ask you if you would please do exactly what I asked Chairman Sikes to do in an earlier time. Would you please provide this committee with a list of the Commission's decisions where the text of the decision was released more than 30 days after the Commission announced its decision, together with the best explanation you can make for the delay beginning on January 1, 2010? Would you do that for us, please?

Mr. GENACHOWSKI. Yes, I will. I am happy to report that period, we have closed in the last 2 years, that period from an average of 14 days to 3 days. In most cases, release is 1 day after Commission adoption of the order.

Mr. DINGELL. Thank you.

Now, I recognize that the 30-day period which was referred to in my questions is arbitrary and it does not respond to either statute or regulation. It does seem to me that a delay of 30 days or more does provide opportunity for impropriety, and I would urge the Commission to comment on this opinion for the record, especially in view of all of our desires to improve the transparency at the Commission and this committee's ability to conduct rigorous oversight.

Now, in the case of decisions whose release is delayed for 30 days or more, does the Commission commit at this time to providing this committee with a written explanation of the delay and projected date for the release?

Mr. GENACHOWSKI. Yes.

Mr. DINGELL. Now, I want to make it clear, we have to make a selection here between two situations, the first of which is where the Commission releases the decision and there is a delay between the time that the matter is then made final. There also is the situation—and this I know afflicts the Commission substantially, and that is, you have sent things over to the Office of Management and Budget which duly forgets that you are an independent agency of the Congress and insists that these matters be held up over whatever qualm the Administration may have on the matter.

So in any event, Mr. Chairman and members of the Commission, I thank you.

Mr. Chairman, I thank you for your courtesies to me. I yield back the balance of my time.

Mr. WALDEN. I thank the gentleman for his questions and his willingness to work on these issues to improve the process at the FCC.

Now I turn to the gentleman from Florida, Mr. Stearns, for 5 minutes.

Mr. STEARNS. Thank you, Mr. Chairman.

Chairman Genachowski, this is a question for you, if you can recollect this. I think we have already talked about the Commission's backlog. How many petitions or applications are currently pending before the Commission?

Mr. GENACHOWSKI. That is a number I don't have in my head. I will get it for you.

Mr. STEARNS. Can you guess? Give an approximate range? When we do financial disclosure, we have a range.

Mr. GENACHOWSKI. There are many small ones. The number is in the thousands, not in the tens.

Mr. STEARNS. Do you have staff behind you that might know? These staff, that is what they are paid for.

Mr. WALDEN. They are texting somebody right now.

Mr. GENACHOWSKI. We will get an answer within 5 minutes.

Mr. STEARNS. OK. How many of these are more than 6 months old?

Mr. GENACHOWSKI. That is another question I can't answer off the top of my head.

Mr. STEARNS. OK. How many are more than 2 years old; 5 years old? Do you think any of them are older than 2 years?

Mr. GENACHOWSKI. It is possible some of them are.

Mr. STEARNS. Any over 5 years?

Mr. GENACHOWSKI. I don't know, but it is possible.

Mr. STEARNS. We have heard that parties with a transaction before the FCC sometimes feel pressure to curtail their advocacy in unrelated proceedings. I guess my question is: Fundamentally, do you agree that every constituency should be free to advocate before the Commission without any pressure?

Mr. GENACHOWSKI. Absolutely. Can I say one word on the previous question?

Mr. STEARNS. Yes. I hear all the time that people are totally intimidated by you folks, and I can understand why, because a decision by you folks is not just a hundred-dollar decision, it is billions. So you have this much power. They come back to me, a lot of them are intimidated, so they want to be free to be an advocate before the Commission without pressure.

Mr. GENACHOWSKI. On this question, the Commission has an obligation to base each decision that it makes on the issues before it, on facts and data. We are all very committed to that.

On the previous issue, there is an area for reform here that I would like to mention briefly, which is that a lot of the backlog comes from applications for review of relatively routine bureau decisions that are made. Because of the APA, sometimes it is thought that it requires the Commission to do its work all over again in order to address it in advance of litigation.

We have been exploring some reforms here to speed this up and to help eliminate the backlog that relates to applications for review from bureau orders. That is something I look forward to working on with you and the committee.

Mr. STEARNS. Commissioner McDowell, you touched on in your opening statement, and I looked at some of your letters you have written in the past, the FCC's transaction review standards I think are vague and sometimes susceptible to abuse. For example, parties with a pending transaction should not feel pressure to accept voluntary conditions on the deal. The Commission can also leverage its merger review process to adopt conditions that it could not otherwise impose through a transparent and public rulemaking.

My question for you is: How can we narrow the Commission's authority to simply address these concerns?

Mr. MCDOWELL. That can come through a statutory change, as has been pointed out today already. There is a large, ambiguous public interest standard by which we review mergers. But if a stat-

utory provision were added to say any conditions or voluntary commitments extracted from the merging companies should be specifically tailored to consumer harm that arises out of the merger, and perhaps look into maybe sunsetting them once market conditions obviate the need for any further regulation.

Mr. STEARNS. Mr. Chairman, do you want to add to that at all?

Mr. GENACHOWSKI. In the Communications Act, Congress has placed an important responsibility on the FCC to make a public interest determination, to find that a proposed transaction is in the public interest. That is something we take very seriously. I think all Commissioners do. It is understandable why companies would suggest the public interest reasons for a transaction. Sometimes there are specific potential harms that emerge from a transaction that in order to approve the transaction, it is necessary to impose conditions. This has happened under Democrats and Republicans at the FCC.

Mr. STEARNS. My last question, Mr. Chairman, is to Commissioner McDowell. Again, I am concerned that the FCC has been regulating in areas without first clearly identifying its own authority to act. From voice obligations, net neutrality, to broadband outage reporting, the FCC has fallen into the habit of proposing rules without first tying those rules to the authority given to it by the Communications Act. I know every bill I drop, I have to show constitutionally that that bill complies with the Constitution. What best practices would you recommend going forward based on what I just told you?

Mr. MCDOWELL. The Commission in areas where I have dissented certainly has made legal arguments justifying its legal authorities. I can't think of an item that didn't have a legal argument. But as lawyers know, there are legal arguments that are colorable, and there are legal arguments that are winnable. This is fine grades of distinction sometimes. It is hard to say how do you keep the FCC to act within its authority other than read the statute and the plain meaning of it.

Mr. STEARNS. Mr. Chairman?

Mr. GENACHOWSKI. Two points. In the last few years, the FCC record in court on statutory challenges has been overwhelmingly positive. I don't remember the number of the top of my head, but I will get it for you. But overwhelmingly successful.

The second thing is, when there are colorable questions of authority, we seek comment on that in the notice and comment stage. We did it yesterday in looking at updating our network outage rules to protect the safety of the public in event of emergencies. There is a colorable question about authority. We will be looking at that carefully in the record.

It is vital that we move forward on public safety issues like that, working together with the committee. If we don't think we have the authority, we will come to you and ask for the authority. But getting a public record and asking our terrific legal team to focus seriously and honestly on the authority issues is what we try to do.

Mr. WALDEN. I thank the gentleman from Florida.

I now turn to the gentleman from Pennsylvania, Mr. Doyle.

Mr. DOYLE. Thank you, Mr. Chairman. Thank you for holding this hearing.

Welcome to the members of the Commission. I have had the opportunity to work with each and every one of you, and I have appreciated your hard work and dedication. All of you are very good members of the Commission.

Commissioner Copps, I know your term is expiring this year and I just want you to know that if I were the benevolent dictator of the universe, as scary as that thought may be, your term would have no expiration date. Thank you for your service to the Commission. You have been one of the best ever.

Now, Chairman Genachowski, I can't pass up the opportunity while I have got you all here. As you know, just recently the House and Senate passed, and the President signed into law, the Local Community Radio Act last year. And this is legislation that is going to open up the airwaves for hundreds of new low-power radio stations across the country, including community radio stations in cities like Pittsburgh and all across the United States.

Mr. Chairman, I know the Commission is working on it, but I want to make sure that the draft rules are going to come out by the end of the spring. Could you give us a sense of timing on this?

Mr. GENACHOWSKI. First of all, congratulations on the passage of the legislation. Bipartisan, very important, and we are working to implement it as quickly as possible because we think it is a real achievement and will really help the local communities. Our media bureau is working on it. I will redouble my efforts to make sure that it happens as quickly as possible.

Mr. DOYLE. I want to piggyback on some questions that Ms. Eshoo talked about with special access to. I have always thought that name "special access" is a misnomer. It should be called "critical access." I note that your broadband plan agrees with that. I have real concerns about the affordability of these lines as report after report comes out, whether it is the GAO or the national broadband plan or others, that indicate that the sellers of these lines are continuing to overcharge their competitors.

Quite frankly, the FCC, it has been rather frustrating to get you to address this question. It has taken quite a long time to come to a decision on the matter, and I am just trying to understand what is causing this delay, and when do you think that you will obtain the information that you need to finally bring a vote to the Commission? Please don't tell me "as soon as possible." Give me something more definitive than that.

Mr. GENACHOWSKI. My frustration was that when I arrived at the Commission and we started to look into this issue, the paucity of data that the FCC had was very troubling. There is no point to doing something in this area that is not based on a record, that is not based on facts and data, and that wouldn't be upheld in court. We also didn't want to put out a broad data request that, one, would be burdensome on industry; but, even more important, would not be manageable for us because it is a very complex area.

And I think our team did a fantastic job working in a focused way to identify the data that we would need to be able to make a determination on whether there is an issue that requires us to act; and if so, what an appropriate action to take would be.

We are still in that process. We have completed the first round of data coming in. The staff is analyzing that. We will continue to

work with you on it. But I agree with with you on the importance of this issue, and we are working very diligently on it.

Mr. DOYLE. By next year? By 2030?

Mr. GENACHOWSKI. Well before that.

Mr. DOYLE. Well before 2030?

Mr. GENACHOWSKI. I agree with you. I can't say because we are analyzing the data, and I don't want to prejudge it. I want the staff to do its job as fast as it can because it is an important issue that goes to competition and broadband deployment.

Mr. DOYLE. Do any other Commissioners have a comment on special access?

Mr. COPPS. I think it is important for us to get to a final resolution. When you are talking about a market that is approaching tens of billions of dollars a year, and you add in there however many years this has been pending, and you think are companies going out of business, is competition being disrupted, it instills in me the same sense of urgency that you have.

Mr. MCDOWELL. Absolutely. I have been at the Commission almost 5 years, and it is sort of like Groundhog Day on special access. We are coming up on the fourth anniversary of Congressman Markey's letter to the Commission insisting that we have some resolution by September of 2007. It is now 2011.

Really what we need, as I have been saying for almost 5 years now, is cell site by cell site, building by building map with price, terms, and conditions of all providers of special access, competitive providers as well as incumbent providers. This isn't as hard as it seems. The DOJ gathered this data in 2005 during the Bell long distance mergers, and it is really not as daunting as it sounds.

Legally there might be an issue whether you can compel certain companies to provide that data, and that is where the problems have been. A lot of companies know that they don't have to provide the data; it might be competitively sensitive, things of that nature. But if you go to an industry trade show, business-to-business trade show, they are buying and selling special access circuits from each other. So all of the sales guys have this data. It is not that hard to find. But that would give us, let's get a real-time snapshot of what does the market actually look like. I think where there is more competition in a market, we ought to deregulate. And if there is not enough competition, then we need to figure out what to do.

Mr. DOYLE. Commissioner Clyburn?

Ms. CLYBURN. I agree with my colleagues. One of the first meetings that I took as a Commissioner dealt with special access. When these same parties see me, they look at me and we don't even have to exchange words. So I agree with you about the urgency. And especially being from a rural State, I agree that this is a significant barrier for enhanced service. I am looking forward to continuing to working with the Chairman in order to get resolution here.

Mr. DOYLE. Thank you.

Thank you, Mr. Chairman.

Mr. WALDEN. Thank you for your work on these issues, Mr. Doyle.

We are going to do a second round of questions.

There are a couple of things I would like to go through. First, the top seven best hits of our memo, some of the ideas we kicked out

there, and I would draw your attention to the staff majority memo, if you have it. If not, if you can give us your feedback on these seven items.

From the outset, I am not trying to lock you into stupid restrictions, but I am trying to figure out is there a way to put in the statute good things, some of which Chairman Genachowski has already enacted as Chairman or you have codified in your rules, so regardless who is chairing this or regardless of the personality dynamics that may occur, 5, 8, or 10 years from now, the good processes are there for the public? So I throw that out.

So the notion, and I know this doesn't work well, but yes or no, the concept with flexibility built around all of these, trying to go to notices of inquiry before NPRMs; does that make sense? Does that not make sense? Commissioner Clyburn?

Ms. CLYBURN. Yes or no, hmm. I think when the Commission needs more information, yes, it is warranted. But we are in the information exchange business. We have public notices and the like, and so we get a lot of information. When we need more information, then yes. But in the case where we don't, where we have sufficient information, I think it would delay the process.

Mr. WALDEN. Commissioner McDowell?

Mr. MCDOWELL. Yes, with flexibility that can't be abused.

Mr. COPPS. Yes, usually; but always remember there are crises and emergencies, terror attacks and things that demand expeditious action when you can't do that.

Mr. GENACHOWSKI. I would say as a general rule, we do it. There are many exceptions. It might be a statutory mandate. It might be further notice. It might be court remand. It might be that we have enough information to proceed. I am not sure that a statutory change is required.

Mr. WALDEN. That is fair.

Publishing the proposed rules, you don't always publish a text for public comment before adopting the public rules. Should the proposed rules always be published ahead? Chairman Genachowski, yes or no?

Mr. GENACHOWSKI. That has been our policy. We have gone from 38 percent to 85.

Mr. WALDEN. Any reason not to go to 100?

Mr. GENACHOWSKI. There are some cases where it might be a form or it might be a further notice where the rules are already out, or it might be that we are seeking comment on a third party's proposals. Our practice is that we always need a good reason in order not to publish proposed rules.

Mr. COPPS. You know, sometimes people don't get serious about we are doing something until you get beyond, well into the NPRM stage, and then they get serious and tell you what they like. So it is not always practical to do that. New data comes in, and again I would say flexibility for emergencies and things like that, but I would commend the Chairman on the tremendous difference we have made in making sure that we do now over 85 percent of the time.

Mr. WALDEN. Mr. McDowell.

Mr. MCDOWELL. Yes, with flexibility that can't be abused.

Mr. WALDEN. Commissioner Clyburn.

Ms. CLYBURN. Yes, flexibility that takes into account any type of public comments.

Mr. WALDEN. Got it. What about minimum comment periods? Statutory minimums for comment reply cycles, does that make sense? Ms. Clyburn?

Ms. CLYBURN. I think if there are statutory obligations involved, they might be problematic. With our video relay, Video Accessibility Act, we had a 6-month window. So if you had certain obligations, that might impede that progress. So again, flexibility and dexterity are my two words for the day.

Mr. WALDEN. Commissioner McDowell?

Mr. MCDOWELL. Yes, with flexibility that can't be abused.

Mr. WALDEN. Commissioner Copps?

Mr. COPPS. The same response.

Mr. GENACHOWSKI. I agree as well. The real issue is making sure that the Commission pursues best practices, and we look forward to working with you on that.

Mr. WALDEN. What about shot clocks? Parties and the public should have some sense of when resolution would come. Hard shot clocks or shot clocks as a report card mechanism, gives you the flexibility, but you maybe report to Congress on your rates of trying to achieve those shot clock numbers?

Again I am not trying to tie your hands, but I think there are issues in the past, in some cases, where things dragged on. I talked to a group recently, they have had a rulemaking for 6 years at the Commission. It was circulated last fall, I believe, and it is still in somebody's in-boxes.

Mr. GENACHOWSKI. I think shot clocks may be an effective tool. We are using it. It may make sense to use more shot clocks. And we are looking at that, and we look forward to looking at that with you.

Mr. WALDEN. Commissioner Copps.

Mr. COPPS. Amen.

Mr. MCDOWELL. Shot clocks helped break the UNC Chapel Hill monopoly on basketball; I am all for that.

Mr. WALDEN. Wow.

Ms. CLYBURN. I always come behind him, and it is always problematic.

All transactions are not created equal; so again, guidelines but not ruling the process is, I think, wise.

Mr. WALDEN. OK. What about publication of final draft for an item scheduled for an open meeting? The FCC could be required to make final draft public a certain amount of time in advance so everyone knows precisely what the Commissioners are being asked to vote upon?

Mr. GENACHOWSKI. I have always been troubled by the logical impossibility of this because there is a draft, there is more input. The draft changes. It gets put out again. And you end up in something where it is actually impossible for the agency to act effectively. The APA process is designed to do this, do a notice, put out rules, get comment, the agency deliberates, makes a decision. It is subject to further review. I think that general process works.

Mr. COPPS. People should know generally and have a clear idea, but you can't keep doing this time and time again until you get the

last "t" crossed and last "i" dotted. At some point we have to be, in the phrase of well-known persons, the deciders on these issues.

Mr. WALDEN. Mr. McDowell.

Mr. MCDOWELL. More often than not, it is a good idea.

Ms. CLYBURN. I would not want anything to stifle any type of exchange that could possibly take place in the improvement of an item.

Mr. WALDEN. What draws me to this one is what we did to change our House rules, require a 3-day calendar day layover so everyone has a chance to see it. And sometimes that is inconvenient if you want to cram something through. But it is the public's business and public process. That is all I am talking about. It would seem to me, you would want them to see the final product and have a little time to comment.

With the indulgence of the committee, if I can go through the remaining couple of items here.

Commissioner initiation of items. The Chairman, CEO controls the agenda, but what about having a bipartisan group of Commissioners being able to weigh in and put items on? I know we went through this earlier, but let us see if Commissioner Clyburn has been swayed by the incredible evidence that has come out during the hearing.

Ms. CLYBURN. Thank you, but no.

Mr. WALDEN. You don't want to be able to help set the agenda?

Ms. CLYBURN. I think I do that. I have that type ofrapport.

Mr. WALDEN. You weren't there in the old days. Commissioner McDowell?

Mr. MCDOWELL. Yes. I have supported this kind of concept when I was in the majority on the Commission, and I support it today.

Mr. WALDEN. Commissioner Copps?

Mr. COPPS. I would just repeat what I said. I think three Commissioners ought to have the ability to put an item on the agenda, take an item off the agenda, and edit the agenda.

Mr. GENACHOWSKI. As I said, I think nothing is broken; 95 percent of our decisions are unanimous. We work collaboratively. I can't imagine a situation where there would be a problem, and there has only been one anomaly that I am aware of historically.

Mr. WALDEN. I will stop with that. There are some others here. I think you all have this. The committee has been very kind to let me work through those.

We would like your feedback on them. We kicked these out as discussion points. Some make sense, and some don't from a statutory standpoint. Some you can go ahead and do, and you are. And I appreciate that.

I would turn now to the gentleman from Massachusetts, the always colorful Mr. Markey.

Mr. MARKEY. I will take that as a compliment.

Mr. WALDEN. As intended.

Mr. MARKEY. Welcome, all. We are at an historic juncture. There is now an announced plan by AT&T to buy T–Mobile for $39 billion in the latest in a series of major transactions at the Commission for you to review, pursuant with your authority.

The merger would reduce the number of national wireless companies from four down to three, and then the next step would be the

inevitable gobbling up of Sprint by Verizon, so we would be back down to two, which would be kind of going into the telecommunications time machine back to 1993 before this committee wisely decided that the two companies that had all of the licenses, one of them was the progeny of AT&T, all of the regional companies had one license, and other people had the other one, McCaw significantly, but it was 50 cents a minute. It was analog. It was not a particularly robust marketplace. And people did not have cell phones in their pocket.

So I thought it would be good if we looked back through the mists of mobile time so we can understand where we were, how we got here, and why we really don't want to go back at all. This isn't even an open question because we had more than enough time to learn how big companies view how fast you can move in the deployment of mobile technologies.

So back in October of 1993, on a bipartisan basis, it was a beautiful thing; the general disgust that this committee had with the lack of progress in the mobile area led us to moving over 200 megahertz of spectrum for the creation of a third, fourth, fifth and sixth license.

You two big boys, you really don't need any more unless it is in a market you are not in anymore. So that was kind of our message.

They weren't particularly happy with it. In fact, the general who ran all spectrum for the Federal Government for the Defense Department, he wasn't happy with it either. But we told them all: Figure it out; you, know, do your best, but we need that spectrum. We need a robust marketplace. We want to move and be number one.

So we had this incredible breakthrough, and we moved from 50 cents a minute. Within 4 years, it was under 10 cents a minute. All of the companies, including the two incumbents, had to go digital, which is much more versatile. It was quite a transformation.

If you can imagine, here is where we were when we passed the bill. We had this brick. Anyone remembering carrying this around in your pocket? This is the brick. And by 1996, we had moved to the BlackBerry. Brick to BlackBerry, 4 years. This committee, a lot of insight.

Those first two companies, they really didn't think that they wanted to move this fast. As a matter of fact, they told us in testimony they couldn't move this fast. It just wasn't going to be a general consumer product. They were targeting businessmen on mountaintops, I think. So that was it. Again, their message was, don't regulate.

So the question is: Do we want to turn the clock back to that duopoly? Do we want to go back to the brick in terms of how fast companies are forced to innovate? Do we want to trust those two companies again to move faster? I don't think we want to do that.

I think it would be a historic mistake for the FCC to approve this merger. I think we would go into a telecommunications time machine, back to that point in time. We already have got Verizon and AT&T pretty much dividing the country into Bell East and Bell West, which is the plan. Letting them have a national wireless duopoly is what is at stake here.

I have seen the movie before. I know how it ends for consumers, with them being tipped upside down and having money shaken out of their pockets.

We are the ones in this committee that made sure that we ended that era. I think it is critical for the FCC to apply its own very brief history on this subject. You know, this is not something where we have to go back to Alexander Graham Bell. There are people within our own lifetime we can go back to. They are still alive. They were here in 1993. They can still be consulted about what the state of that marketplace was.

All I can tell you, it would be a historic mistake to go back to that time with the promises that come from two behemoths that they will continue to innovate. History tells us, after 100 years from Alexander Graham Bell up until 1993, they do not innovate. And that is the key. It is innovation and it is investment in new technology and it is paranoia-driven Darwinian competition that ultimately leads to the changes that help consumers and competitors.

And I hope you all keep that in mind as you are going forward, because this is going to be the biggest decision you make, and I hope you make the right one.

Thank you, Mr. Chairman.

Mr. WALDEN. I thank the gentleman. I would remind members of the committee that we have to be a little careful since this is a decision before them when it comes to the Pillsbury rule and all.

Mr. MARKEY. Are we in the Pillsbury time right now?

Mr. WALDEN. Back to the BlackBerry.

Mr. MARKEY. Excuse me? Was that a question?

Mr. WALDEN. No. They are going back to the BlackBerrys to find out.

Mr. MARKEY. Are we in the Pillsbury time? Are we constricted in our committee hearings from expressing our views on a merger?

Mr. WALDEN. Not your views.

Mr. MARKEY. Yes.

Mr. WALDEN. And I am not an attorney. I think there are issues. It was suggested in another hearing in another context with an issue before a Commission that we have to be careful in terms of how we convey our thoughts is all, I was told.

Mr. MARKEY. I am a lawyer.

Mr. WALDEN. I won't hold that against you.

Mr. MARKEY. And I think there are lawyers down there. Can the staff assist? I think the staff is packed with lawyers. Are we in the Pillsbury time frame right now?

Mr. WALDEN. That is what I said, they are going to their BlackBerrys.

Meanwhile, we will proceed and go to Ms. Eshoo for 5.

Ms. ESHOO. Thank you, Mr. Chairman.

While the lawyers are going back and forth, I don't know a time where Members cannot express an opinion. Mr. Markey is not asking the Commissioners for their thinking on the matter that he just raised. He expressed his opinion. And so God help us if Members of Congress can't come in as members of a committee and express an opinion. I understand that there is—that Mr. Markey's opinion

may be menacing to some, but nonetheless—or discomforting—but it is an opinion. I think it is an important opinion.

Whether Pillsbury or anything else gets in the way here, I am not a lawyer to make that determination, but I don't think that is the question, most frankly.

Chairman Genachowski, some have expressed concerns recently that the FCC has shied away from using a notice of inquiry to first examine a broad set of issues rather than proceeding straight with the proposed rules in a notice of proposed rulemaking. Do you think that proceeding with notices of inquiry can be an effective approach, and have you employed the NOIs more often under your chairmanship compared to previous administrations?

Mr. GENACHOWSKI. We have used NOIs frequently. I think about half of our notices of proposed rulemakings have been preceded by NOIs. And often, especially when it is a new issue or fresh issue, it is a good place to start. When we are dealing with a statutory mandate to implement something, when the Commission has vast experience coming out of prior proceedings, when there are real timeliness issues around perhaps public safety, then NOIs may not be the way to go. And I think we try to be thoughtful about, with each proceeding, how to get the balance right between developing a full, inclusive public record and moving in an expeditious manner for the public and all stakeholders.

Ms. ESHOO. But do you believe that an NOI must precede any proposed rulemaking?

Mr. GENACHOWSKI. I don't think that it is now a requirement or should be a firm requirement.

Ms. ESHOO. I don't have any other questions, Mr. Chairman. I do think, if I might, the list of suggestions that you had today, your punch list, that we have the Commissioners all respond to them.

Mr. WALDEN. Yes. I actually asked them to do that. I agree.

Ms. ESHOO. I didn't hear that. I think it would be helpful, after you have had some time to give some thought to it, that we hear back from each one of you on them. Thank you.

Mr. WALDEN. I turn now to Mr. Doyle, if he has any further questions.

Mr. DOYLE. Mr. Chairman, in the interest of eating lunch, I have no further questions.

Mr. WALDEN. With that then, I want to thank both of our committee members who participated so well in this committee hearing, and especially the FCC Commissioners and the Chairman. Thank you for your thoughtful approach to this. We look forward to continuing to work with you on a cause that I know we share, which is to continue to improve——

Mr. MARKEY. Mr. Chairman, before you conclude, has the Commission staff been able to identify whether or not a Pillsbury—OK, not yet.

Mr. WALDEN. Do you want us to wait until they get an answer or can we go ahead and adjourn? I think we will go ahead and adjourn the hearing.

Mr. MARKEY. You raised the issue, and it was in the aftermath of my comments, and I just wanted to know if my congressional prerogatives are in any way contradicted by any prerogatives of the FCC. If they are, I want all the members of the committee to know

how we are all restricted in terms of our recommendations to the Commission, and I just don't want the committee hearing to end until that is established because that is quite a statement made to me.

Mr. WALDEN. No, let's not overtake what I said, OK. What I said was I just would caution the committee, this is an issue before the Commission and we have to be cognizant of these rules. This was not a criticism of what you said. And we each have the opportunity to express our views. That is not about that. This was not about you or about what Ms. Eshoo said. We will probably have a hearing on this issue, and rightfully so.

I just know in a different subcommittee with an issue before the Nuclear Regulatory Commission that is before them, we were advised not to try and affect the Commission's decision in that process because it is something before them. So this was in general context. That is all it was.

Mr. MARKEY. If the gentleman would yield, is the intention of the hearing which you are going to have to in any way affect the decision made by the FCC?

Mr. WALDEN. Not if it violates the Pillsbury rule.

Mr. MARKEY. No, you are saying if it does not violate the Pillsbury rule. Do you know if that hearing will violate the Pillsbury rule?

Mr. WALDEN. I won't hold it until I find out the answer to that question.

Mr. MARKEY. OK, I think that is an important thing for you to say. So rather than saying you are going to have the hearing, you should say: I am going to have the hearing if it is not a violation of the Pillsbury rule, because I don't want any member of this committee to influence the way in which any member of the FCC thinks. OK? If that is the opposition going forward, I can live with that. In fact, if that is our committee policy, then I would like to have that established so I know that and every other member knows that.

Mr. WALDEN. Yes. Slow down. Take a breath. Here is the deal.

Mr. MARKEY. I am not the person who made the accusation that there is a potential Pillsbury violation.

Mr. WALDEN. Nor did I.

Mr. MARKEY. Yes, you did.

Mr. WALDEN. No, that was not my intent. I would be happy to go back and listen.

Mr. MARKEY. Let me put it like this: It was the effect. If it was not the intent, it had that effect.

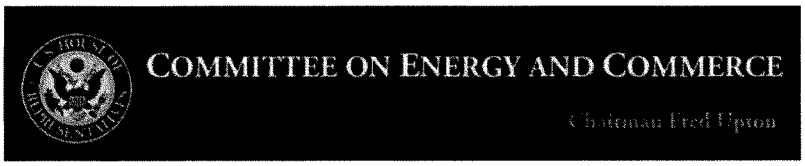
Mr. WALDEN. All right. That was not my intent. If it was assumed that way, I take that back. That was never my intent. I am just trying to do something cautiously here and not get anybody in any trouble.

And when we have a hearing, we might not have the Commissioners before us. When they are not before us, I think we are pretty open in what we can say, right? That is all. That is all that it is.

With no other business to come before the subcommittee, we are adjourned.

[Whereupon, at 1:06 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]



Statement of the Chairman Fred Upton
Subcommittee on Communications and Technology Hearing
on FCC Process Reform
(Remarks Prepared for Delivery)

Due to Commissioner Baker's upcoming move, she is unable to be with us today. Still, I want to begin by recognizing her tremendous contributions to our communications sector over her tenures at the NTIA and FCC. Commissioner Baker has upheld the highest standards in her service, and I am sure she will continue to do so in her new job. I am pleased to count her as a colleague and a friend.

Turning to today's topic, I have said before that for an "expert" agency to deserve that title, it should be performing objective analyses. As an independent agency, the FCC should not be seen as making political decisions.

Unfortunately, as communications issues have become more political and the stakes for affected parties have grown, the FCC has come under pressures that may not be healthy. The agency has fallen into some bad habits as a result. This is a bipartisan problem, with both Republican and Democrat chairmen falling short at times. I commend Chairman Genachowski for taking some important steps to address these concerns. But more can be done.

Good process can simultaneously increase the quality of the commission's decisions and shield it from perception problems. While I don't have all the answers, there are some common-sense process improvements I'd like to see implemented. For example, the commission and its work would benefit from more rigorous economic analysis before agencies intervene, clearer timelines for decision-making, and more concrete, periodic reassessment of existing regulations to determine whether they are performing as intended.

The current transaction review process also troubles me. As it stands, the FCC can require almost anything of the parties. This includes conditions that have little to do with issues raised by the specific transaction, and some the FCC would not ordinarily have the authority to impose as a regulation.

This is problematic. If a transaction is a good one, I'm not sure why conditions would be appropriate. If the transaction poses problems, it's not clear to me how unrelated conditions would cure them. Ironically, the current regime encourages the FCC to grant every transaction, and simply tick off the various unrelated policy objectives of the day as the cost of admission into the system. This horse-trading (and some have called it far worse) also drags out the process, especially since the FCC has only an informal shot-clock that it can pause whenever it cares to. The parties and the public deserve better.

Process reform can help address these and other issues, producing increased investment and job creation as an important byproduct. I thank the commissioners for being here and look forward to hearing their thoughts as well as those of my colleagues.

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FEDERAL COMMUNICATIONS COMMISSION

JULIUS GENACHOWSKI
CHAIRMAN

July 6, 2011

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives
2182 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Walden:

Attached please find my responses to the additional post-hearing questions from my appearance before the Committee on May 13, 2011. Please let me know if I can be of further assistance.

Sincerely,

Julius Genachowski

QUESTIONS FOR THE RECORD
May 13, 2011 FCC Reform Process Hearing

The Honorable Henry A. Waxman

1. Some members of the Committee have suggested that the Communications Act be amended to require that the Commission allow a minimum of 30 days for comments and 30 days for reply comments in docketed proceedings. Would you support a minimum time requirement for comments and replies? What has been the average comment and reply comment time period during your Chairmanship?

   Response:

   Currently, the Commission's average comment period is 37 days and the average reply comment period is 22 days. The Commission's comment periods should strike the right balance between ensuring efficient performance of agency responsibilities and ensuring time for public input and a strong record.

   There are instances where a minimum time requirement for comments and reply comments would hamper the Commission's ability to proceed quickly to fulfill a statutory mandate to enact rules, such as under the recently passed 21st Century Communications & Video Accessibility Act and the Truth-in-Caller ID Act. Also, shorter comment periods are used in routine Commission matters, as well as instances that do not require a lengthy open record such as fee proceedings and refreshing records in open proceedings.

2. Some members of the Committee have expressed concerns that the FCC has not adequately utilized Notices of Inquiry (NOI) to initiate certain proceedings. These members are concerned that by moving directly to a Notice of Proposed Rulemaking, the Commission is suggesting that regulation is required... How have you employed NOIs? How does your use of NOIs compare to the previous administration? Do you believe it is a good idea to precede NPRM's with NOIs?

   Response:

   NOIs can be a helpful tool. The Commission has used NOIs to gather information related to new or novel issues, such as Next Generation 911 (NG911), the deployment of advanced telecommunications capability, and technological issues related to the reliability, resiliency and continuity of communications networks. Under my administration the Commission has issued 18 NOIs. The previous FCC under Chairman Kevin Martin issued only 11 NOIs in four years.

   NOIs are useful tools when seeking to understand new technologies or market trends. At the same time, there are instances where the FCC has considerable experience in an area, such as retransmission consent, where it may be appropriate to issue an NPRM without first issuing

an NOI. Requiring NOIs for all potential rulemakings would place another regulatory layer on processes that sometimes need to move expeditiously, and could increase burdens on stakeholders—especially smaller stakeholders—who may feel compelled to provide comments in multiple proceedings. It also could encourage a redundant review process that harms emerging services, exhausts internal resources, and slows regulatory review.

3. When a proceeding moves forward under delegated authority, what procedures govern appeals of bureau action? Can bureau actions be appealed to the full Commission?

Response:

The Communications Act provides two avenues by which to seek review of an action taken by a bureau or office under delegated authority. First, a "party" to the proceeding "or any other person aggrieved or whose interests are adversely affected" by the decision may file a petition asking the bureau or office to reconsider its action. 47 U.S.C. § 405(a). The FCC has adopted rules to govern the reconsideration process. *See* 47 C.F.R. § 1.429 (petitions for reconsideration in rulemaking proceedings); 47 C.F.R. § 1.106 (petitions for reconsideration in adjudicatory proceedings). The bureau or office that issued the challenged order will issue an order on the reconsideration petition.

Second, a bureau- or office-level action, also known as a staff-level action, may be appealed to the full Commission: "Any person aggrieved by" a bureau or office action "may file an application for review by the full Commission" to review the staff-level action. 47 U.S.C. § 155(c)(4). *See also* 47 C.F.R. § 1.115 (FCC rule governing the application for review process). In those circumstances, the full Commission will issue the order on review and may grant, in whole or in part, or deny the application for review. 47 U.S.C. § 155(c)(5). In addition, under 47 C.F.R. § 1.117(a), the Commission has 40 days to review on its own motion decisions made by the staff under delegated authority.

4. Please provide examples of existing efforts by the FCC to eliminate legacy regulation.

Response:

Early in my tenure, I charged an FCC Reform Team with identifying unnecessary and burdensome regulations and clearing regulatory underbrush. As I testified during the House Committee on Energy and Commerce's May 13, 2011 hearing, the Commission already has revised and deleted 49 outdated regulations, more than twice the number of rules issued. It also has identified and targeted 20 sets of unnecessary data collections for possible elimination and initiated the process for ending five collection requirements in international communications and two collection requirements for certain telephone companies.

These efforts are concurrent with statutory requirements to review existing regulations. These include:

- Section 10, which permits any party to petition or the Commission on its own motion to forbear from applying statutory or regulatory requirements applicable to telecommunications carriers or services if the requirements are found to no longer be necessary and in the public interest;
- Section 11, which requires a biennial review to eliminate telecommunications regulations that are no longer necessary in the public interest;
- Section 202(h), which requires the Commission to review its media ownership rules on a quadrennial basis to determine "whether any of such rules are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest."
- Section 257, which requires the Commission to report to Congress on efforts to identify and eliminate regulatory barriers to market entry for entrepreneurs and other small businesses with respect to telecommunications services and information services; and
- Section 332, which permitted the Commission, akin to Section 10, to forbear from imposing certain requirements of Title II on commercial mobile services.

In addition, under section 610 of the Regulatory Flexibility Act (RFA), the Commission conducts a yearly review of all ten-year-old regulations. Also, a number of the Commission's bureaus are engaged in the biennial review process required by Section 11 of the Communications Act, which will determine whether meaningful economic competition negates the need for specific rules affecting telecommunications services. Also, as part of its overall review process, the Commission's Office of General Counsel also is conducting an analysis of existing statutory measures to determine if any appear appropriate for repeal or revision. Below are some examples of the Commission's ongoing efforts:

- *NPRM* proposing to eliminate the International Settlements Policy for almost all international points (FCC 11-75; rel. May 13, 2011).
- *NPRM* proposing rule changes in Part 25 to eliminate redundancy and update cross-references, making it easier for satellite and earth station applicants to prepare applications (FCC 10-21; rel. Jan. 26, 2010).
- *NPRM* proposing rule changes to Part 13 to reduce the requirements for obtaining a radiotelegraph operator certificate, and to eliminate the requirement that radiotelegraph operator certificate holders file renewals (FCC 10-154; rel. Sept. 8, 2010).
- *Second FNPRM* proposing to eliminate certain limitations on how Private Land Mobile Radio stations can transmit station identification (FCC 10-36; rel. Mar. 11, 2010).
- *NPRM* proposing to eliminate the Part 87 requirement that a licensed technician be present when certain station equipment is installed or maintained (FCC 10-37, rel. Mar. 16, 2010).
- *NPRM* proposing modifications of certain technical rules in order to adapt to changes in technology and needs (FCC 10-77, rel. May 6, 2010).

5. Please provide a list of statistical reports that are not being completed on schedule, as well as

a list of the total number of reports the FCC is required to provide to Congress (regardless of frequency).

Response:

The Commission is required by statute to provide 26 reports to Congress, 19 of which are annual. All but one is on schedule.

The only statistical report not being completed on schedule at this juncture is the Status of Competition in the Market for the Delivery of Video Programming, Telecom Act of 1996, Pub. L. No. 104-104, 110 Stat. 153. Reports for 2007 through 2010 were completed.

As of July 1, 2009, the Commission had an outstanding Supplemental Notice of Inquiry (NOI) to gather data for 2007, 2008, and 2009, following a significant delay by the previous administration. Soon thereafter, the Commission initiated a comprehensive review of the way in which it uses data, including data used for this report. It also revised the analytical framework for its competition reports overall to present data in a uniform and consistent manner. In the course of that review, the Commission determined that the data submitted in response to the Supplemental NOI, as well as a previous NOI, would be insufficient to produce an adequate report under the new approach.

On April 21, 2011, therefore, the Commission released a Further NOI soliciting additional data for 2009 and data for 2010 for the first time. The comment cycle for the Further NOI closes in July. The Commission thereafter will prepare its 14th Video Competition Report, covering the period from 2007 through 2010.

Below is a chart listing the total number of reports the FCC is required to provide to Congress:

Junk Fax Report	Junk Fax Prevention Act of 2005, Publ. L. No. 109-21, 119 Stat. 359 (2005)
ORBIT Act Report	Open Market Reorganization for the Betterment of International Telecommunications (ORBIT) Act, Pub. L. No. 106-180, 114 Stat. 48 (2000) *as amended,* Pub. L. No. 107-233, 116 Stat. 1480 (2002), *as amended,* Pub. L. No. 108-228, 118 Stat. 644 (2004), *as amended,* Pub. L. No. 108-371, 118 Stat. 1752 92004), *as amended,* Pub. L. No. 109-34, 119 Stat. 337 (2005)
Satellite Competition Report	Open Market Reorganization for the Betterment of International Telecommunications (ORBIT) Act, Pub. L. No. 106-180, 114 Stat. 48 (2000) as amended, Pub. L. No. 109-34, 119 Stat. 337 (2005)

Status of Competition in the Market for the Delivery of Video Programming	Section 628(g) of the Communications Act of 1934, as amended
Report on In-State Broadcast Programming	Satellite Television and Extension and Localism Act of 2010, Pub. L. No. 111-175
Impact of Low Power FM Stations on Full Power Commercial FM Stations	Local Community Radio Act of 2010, Pub. L. No. 111-371, 124 Stat. 4072
Triennial Report: Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses	Section 257 of the Communications Act
Regulatory Flexibility Analysis & Small Entity Compliance Guides	Small Business and Work Opportunity Act of 2007, Pub. L. No. 110-28, 121 Stat. 204 (2007)
NET 911 Fee Accountability Report	New and Emerging Technologies 911 Improvement Act of 2008, Pub. L. No. 110-283, 122 Stat. 2622
State of Competitive Market Conditions with Respect to Commercial Mobile Radio Services	Section 332(c)(1)(C) of the Communications Act of 1934, as amended, 47 U.S.C. section 332 (c)(1)(C)
Section 706 Report	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 153, as amended, Pub. L. No. 110-385
NO FEAR Act Report	Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (NO FEAR) Act, Pub. L. No. 107-174
Agency Financial Report (AFR) (Includes FMFIA and IPIA Reports)	Accountability of Tax Dollars Act, Pub. L. No. 107-289; Federal Managers' Financial Integrity Act of 1982 (FMFIA), P.L. 97-255; Improper Payments Information Act of 2002, Pub. L. No. 107-300
Auctions Expenditure Report	Balanced Budget Act of 1997, Pub. L. No. 105-33, as codified in Section 309(j)(8)(B) of the Communications Act of 1934 as amended.
Buy America	Buy American Act, 41 USC § 8302
Federal Advisory Committee Charters	Federal Advisory Committee Act, Pub. L. No. 92-463
Federal Information Security Management Report (Includes Privacy Management)	Federal Information Security Management Act, Pub. L. No. 107-347; Privacy Act, 5 USC § 552a

Improper Payments Report (Estimates and Recovery)	Improper Payments Elimination and Recovery Act of 2010, Pub. L. No. 111-204 (previously Improper Payments Information Act of 2002, Pub. L. No. 107-300)
Improper Payments – Recapture Auditor Recommendations Report	Improper Payments Elimination and Recovery Act of 2010, Pub. L. No. 111-204
OMD/OIG Semi-Annual Report on the Status of Activities	Inspector General Act of 1978, Pub. L. No. 95-452.
Performance Budget (Includes Performance Plan)	Government Performance and Results Act Modernization Act, 111-352 (previously GPRA, Pub. L. No. 103-62); OMB Circular A-11
Performance Report	Government Performance and Results Act Modernization Act, 111-352 (previously GPRA, Pub. L. No. 103-62)
Rules Covered by the Congressional Review Act	Congressional Review Act, 5 USC § 801(a)(1)(A)
Spending Plan	Annual Appropriations Act (currently Section 608 of Division C of P.L. 111-117 – requirements subject to change annually)
Strategic Plan Updates	Government Performance and Results Act Modernization Act, 111-352 (previously GPRA, Pub. L. No. 103-62)
System of Records Notices	Privacy Act, 5 USC § 552(a)

6. As you know, I am a strong supporter of the Open Internet Order adopted by the Commission on December 21, 2010. Part of my support for the Order is based on the clear recognition that rules to preserve an open Internet do not conflict with reasonable efforts to protect content from online theft.

   Specifically, as Section 8.9 of the adopted rules states: "Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity."[1] The Order further states "[o]pen Internet rules are not intended to affect the legal status of cooperative efforts by broadband Internet access service providers and other service providers that are designed to curtail infringement in response to information provided by rights holders in a manner that is timely, effective, and accommodates the legitimate interest of providers, rights holders, and end users." *See* Order at paragraph 111, footnote 336.

   It is my understanding that Internet service providers (ISPs) and copyright owners have voluntarily entered into negotiations to develop and implement carefully-tailored programs intended to educate ISP customers and raise awareness of the consequences of online

copyright infringement. Ideally, this copyright awareness program will curtail copyright infringement activities while preserving a consumer's legitimate online experience.

More specifically, this copyright awareness program would call for copyright holders to provide publicly accessible information about alleged infringing activities to ISPs, who would then alert their respective customers by forwarding notices of alleged copyright infringement from copyright holders. This would be done in a way to maintain customer privacy. For those customers who receive multiple notices, ISPs could enhance the notification process by using measures intended to increase the likelihood that the customer understands the importance of the issue, including steps that would affect data transmission speeds, redirect customers to a landing page, or require contact with customer care.

a. What assurances can the FCC give to ISPs that they can enter into voluntary agreements with copyright owners to identify alleged infringement and notify customers – including agreements that involve measures that may temporarily limit or restrict service to customers who are alleged repeat infringers - without running afoul of the Open Internet rules? Do you believe that such agreements are within the scope of the "cooperative efforts" mentioned in footnote 336 of the Order?
b. Some ISPs are considering the use of a mechanism that would temporarily restrict wireline broadband Internet access service for those customers who have received multiple copyright alerts. Affected customers would be redirected to a "landing page" to review educational materials on copyright infringement prior to the restoration of Internet access service. Once the review is complete, broadband Internet access service would be restored

   Some ISPs may design this redirection process to be triggered only when a customer seeks to access the most commonly visited websites (as determined by third-party objective criteria). My understanding is that using only the most commonly visited websites as a trigger for redirection to the landing page would allow these ISPs to avoid interference with a customer's use of critical broadband communications such as VoIP or home security, for example, while still maximizing the probability that the customer will review the educational material. Would this approach be permitted under the Open Internet rules? Other ISPs may design the redirection process so that it is triggered when the customer seeks to access any website (i.e., not just the most commonly visited websites). Would this approach, also be permitted under the Open Internet rules?

Response:

Like you, I believe that preserving Internet freedom and openness is compatible with protecting intellectual property online. Accordingly, in the *Open Internet Order*, the Commission "emphasize[d] that open Internet rules do not alter copyright laws" and therefore our rules "should not be invoked to protect copyright infringement, which has adverse consequences for the economy." *Open Internet Order*, para. 111.

The *Open Internet Order* includes a "clear statement . . . to ensure that open Internet rules are not used as a shield to enable unlawful activity or to deter prompt action against such activity." *Id.* "[O]pen Internet rules," the *Order* explains, "do not prohibit broadband providers from making reasonable efforts to address the transfer of unlawful content or

unlawful transfers of content," and nothing in those rules is "intended to prohibit or discourage voluntary practices undertaken to address or mitigate the occurrence of copyright infringement." *Id.* Specifically, "[o]pen Internet rules are not intended to affect the legal status of cooperative efforts by broadband Internet access service providers and other service providers that are designed to curtail infringement in response to information provided by rights holders in a manner that is timely, effective, and accommodates the legitimate interests of providers, rights holders, and end users." *Id.*, para. 111 n.336. Rule 8.9 thus specifies: "Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity."

This language in the *Open Internet Order* reflects the importance of both Internet openness and intellectual property. I am confident that cooperative efforts can be found to curtail copyright infringement while accommodating the legal interests of providers and consumers.

I have asked staff to review the description provided and follow up in the near future.

7. On March 1, 2011, the Supreme Court voted 8-0 to reverse a lower court's decision in *FCC v. AT&T Inc.* and held that corporations do not have "personal privacy" interests within the meaning of Exemption 7(c) of the Freedom of Information Act (FOIA). I understand that the case originated with a FOIA request filed by COMPTEL in April, 2005 concerning a Consent Decree between AT&T (by its predecessor in interest, SBC) and the FCC's Enforcement Bureau. Following the Supreme Court decision, please provide an update on the status of the request and the FCC's responses.

Response:

Consistent with the Supreme Court's March 1, 2011 decision in *FCC et al. v. AT&T, Inc. et al.* (No. 09-1279), and following the U.S. Court of Appeals for the Third Circuit's April 21, 2011 Order recalling its mandate, the Commission's Enforcement Bureau on June 3, 2011 provided CompTel with a copy of the records responsive to CompTel's April 2005 FOIA request. In accordance with the FCC Enforcement Bureau's August 2005 decision regarding CompTel's request, the records were redacted to protect information covered by FOIA Exemptions 4, 6, and 7(C) (the 7(C) withholdings were to protect the privacy of individuals named in the records).

In October 2006, CompTel had previously initiated a civil action in the U.S. District Court for the District of Columbia (No. 06-1718) seeking to compel the FCC to release the records in unredacted form. AT&T intervened, claiming that the Commission should withhold the records in their entirety under Exemption 7(C), because disclosure would violate the "personal privacy" of AT&T as a corporate entity. That case was stayed pending resolution of AT&T's claim, which was litigated before the Third Circuit and the Supreme Court.

Following the Supreme Court's March 2011 decision that corporations do not have "personal privacy" under Exemption 7(C), CompTel filed a motion to lift the District Court's stay. CompTel's motion was granted on June 17, 2011, and that civil action now resumes.

The Honorable Anna G. Eshoo

1. Do you support enactment of the Federal Communications Commission Collaboration Act (H.R. 1009)?

Response:

Healthy collaboration among the Commissioners is important to the Agency's smooth functioning. For that reason, I regularly meet with my fellow commissioners in one-on-one sessions to discuss pending issues and encourage robust engagement among Commissioners' staff. I have also adhered to a circulation policy for action items that provides ample opportunity for a productive back-and-forth among the Commissioners. This collaboration has resulted in decisions that are bipartisan and unanimous 95% of the time. There is always the potential for processes to be improved, and I support revisions to the law governing communications among commissioners that are consistent with the underlying principles of the Sunshine Act, and ensure government business is conducted in an open manner fully accountable to the public.

2. Do you support the Commission holding field hearings for the pending AT&T/T-Mobile merger?

Response:

In the past, hearings for merger reviews were not routine. Nevertheless, I am committed to having an open, fair, and thorough process for reviewing this merger, and I expect this to include at least one field hearing.

3. Would the addition of an electrical engineer or computer scientist to your staff, help improve the decision-making process?

Response:

The Federal Communications Commission has an Office of Engineering and Technology (OET) to review and handle engineering issues. In addition, the FCC has a Chief Technology Officer who advises the Commission on technical issues. Each of the Commission's bureaus also maintains engineers and a range of other technical professionals on staff. Commissioners may hire technical advisors, including engineers and computer specialists, within the staffing level set for their individual offices.

The Honorable John D. Dingell

1. Please provide the Committee on Energy and Commerce with a list of the Commission's decisions where the text of the decision was released more than 30 days after the

Commission announced its decision, together with an explanation for the delay, beginning on January 1, 2010.

Response:

I would begin by noting that since taking over as Chairman in July 2009, we have significantly reduced the time between the vote on a Commission decision and its release, from an average release time of 14 days after vote under my predecessor to just 3 days, with a majority released within 1 day. With regards to the specifics of your question, three items were released more than 30 days after the Commission announced its decision. Those items are:

- FCC 09-107 San Jose Navigation Consent Decree

  Adopted December 3, 2009; Released February 16, 2010 (75 days)

  Following adoption of the consent decree, San Jose Navigation's counsel informed the FCC that the company's name had changed to San Jose Technology, Inc. This change raised issues about whether the consent decree would effectively bind the company with the new name. During the post-adoption period, the FCC attempted to contact the company – which is headquartered in China -- for an explanation of the name change and to confirm that San Jose Navigation remained subject to the terms of the consent decree. The FCC negotiated with the company to identify an appropriate signatory to the Consent Decree given the name change and added a footnote to the adopting order explaining the name change and confirming that it did not alter the legal status of the company.

- FCC 11-17 Reorganization of Consumer and Governmental Affairs Bureau
- FCC 11-18 Reorganization of Public Safety Homeland Security Bureau

  Both adopted February 7, 2011; Released April 14, 2011 (66 days)

  These items required reprogramming approval from the appropriators. Release of the items was held until the approval was received.

2. Please confirm that the Commission will notify the Committee on Energy and Commerce in writing of decisions whose release to the public is delayed for 30 days or more, including an explanation for such delay and an estimated date of release.

   Response:

   We will update the above Subcommittee as requested.

3. I agree with the Commission's assessment that reforming Universal Service needs to be tied with reforms to the inter-carrier compensation system. Does the Commission believe such

reforms are its highest priority right now? What is the Commission's timetable for completing reform of these two related initiatives?

Response:

Reforming the Universal Service Fund and the intercarrier compensation system is a high priority of the Commission. We cannot wait any longer to eliminate waste and inefficiency and modernize these systems to extend broadband to the tens of millions of Americans who still lack access. The Commission unanimously adopted a Notice of Proposed Rulemaking on these issues in February, and I expect the Commission to consider an order within the next few months implementing reforms.

4. I understand that the Lifeline Assistance program has almost doubled in size since 2008, to $1.5 billion this year alone. I am further informed that no controls have been put in place to prevent households from receiving Lifeline support for multiple subsidized phones. Is this true? If so, is the Commission working to address this problem, both on an interim and permanent basis? Please provide a detailed response, including an estimate of when the interim and permanent solutions can be implemented.

Response:

The Lifeline/Link-Up program helps ensure that millions of low-income Americans can access basic phone service, providing a "lifeline" to our economy and society for those most in need. According to the Universal Service Administrative Company (USAC), the Lifeline and Link-Up programs disbursed approximately $1.3 billion to eligible low-income consumers in 2010, the last year for which data is available (this includes Lifeline, Link-Up, and Toll Limitation Service, the three components of the Universal Service Fund's low-income program). Given the importance of this program to low-income families, it is essential that the Commission guard against waste, fraud, and abuse in the administration of it.

The Commission has taken a number of steps to prevent duplicative Lifeline-supported service. In March, the Commission released a Notice of Proposed Rulemaking proposing immediate reforms to eliminate waste, fraud, and abuse; improve program accountability; and prevent over-burdening contributors to the universal service fund. These proposals include the establishment of a National Accountability Database to ensure that multiple carriers are not each receiving support for serving the same household and to ensure that only eligible households are participating in the program. This appears to be the most effective long-term mechanism to eliminate waste, fraud, and abuse in the program, and Commission staff is hard at work laying the groundwork for such a database. On June 13-14, 2011, the Commission staff held a group meeting with a number of carriers providing Lifeline service, consumer advocates, and database vendors to follow up on the Commission's March 4, 2011 Notice of Proposed Rulemaking and to further discuss the potential establishment and operation of a national database for Lifeline and Link-Up programs.

The Notice of Proposed Rulemaking also sought comment on near-term measures that the Commission can take to detect and remedy duplicative claims for Lifeline support, including

requiring consumers to provide unique household-identifying information to carriers and procedures for de-enrolling individuals known to be receiving multiple Lifeline benefits. Additionally, the *Notice* proposed to codify a rule that would allow carriers to provide only one Lifeline discount per U.S. Postal Service address. The Commission may adopt some or all of these measures in an order later this year.

On June 21, 2011, the Commission released a Report and Order adopting a rule that an eligible low-income consumer may not receive more than one Lifeline discount at a time. The order also directs the Universal Service Administrative Company (USAC) to implement a process to identify and resolve duplicative claims. Lifeline providers will be required, upon notice from USAC, to de-enroll subscribers who are identified as receiving duplicative support and have not chosen that carrier as their single Lifeline provider. This process, which resulted in part from cooperation among Commission staff, USAC, and a number of the largest Lifeline carriers, is a significant near-term measure that should go far to eliminate duplicative claims for support and prevent waste, fraud, and abuse in the program.

5. Do you believe there are functions at the Commission that could or should be eliminated or scaled back in order to allow the Commission to redirect its limited resources to areas that need it most? Please provide a detailed response, including a list of such functions and your reasoning for why they could or should be eliminated.

Response:

The Federal Communications Commission performs those tasks and functions required under the *Communications Act of 1934*, as amended. The Commission is currently operating at its lowest manpower levels in ten years. The Commission's resources are used to support its core statutory missions, such as licensing. The Commission processes tens of thousands of applications each year, including applications related to transactions.

Whenever the Commission determines that it can achieve its statutory missions while eliminating specific tasks -- such as certain data collections – the Commission uses its rulemaking and ministerial authority to eliminate those requirements.

6. As you know, the Commission will soon begin its Quadrennial Review of Media Ownership Rules. In the past, this statutorily required review has been beset by numerous problems, including attempting to address remands from the Courts of Appeals due to the Commission's failure to justify rules previously adopted or retained in the preceding Quadrennial Review while at the very same time assessing the appropriateness of rules in light of the current and rapidly changing state of technology and the marketplace. For example, there are certain rules, such as the AM/FM radio subcap rule, that some believe have been anachronisms for some time and become even more anachronistic with each passing year. What procedural steps will the Commission take to ensure that its decisions in this Quadrennial Review reflect accurately and fairly the current state of technology and the marketplace?

Response:

The Commission has taken numerous procedural steps to ensure that any rules adopted in this Quadrennial Review reflect accurately and fairly the current state of technology and the marketplace. In this proceeding, we are examining many aspects of the current state of technology, including the proliferation of broadband Internet and other new technologies and their impact on the media marketplace.

The Commission initiated the Quadrennial Review by holding six public workshops throughout the country from November 2009 through May 2010. During these programs, participants discussed the scope and framework of the proceeding. Several of the workshops focused specifically on the current state of technology and the marketplace. For instance, the May 21, 2010 workshop held in Stanford, California, focused on the impact of new media on broadcast stations.

On May 25, 2010, the Commission released a Notice of Inquiry (NOI), to take a fresh look at the current ownership rules in order to determine whether, in light of the dramatic changes in the media marketplace, the rules continue to serve the Commission's public interest goals of competition, localism, and diversity going forward. The NOI asked numerous questions designed to help formulate a comprehensive understanding of the current media marketplace, including questions about: the impact of consolidation on media markets; the transition to digital technology, including digital television and radio; the impact on competition from increased penetration of the Internet; and the availability of alternative sources of news, information, and entertainment online. The NOI also sought comment on whether to retain the AM/FM subcaps, an important issue to many local radio broadcasters.

Finally, to provide data on the impact of market structure on the Commission's policy goals of competition, localism, and diversity, the Commission commissioned a total of eleven studies on a variety of relevant subjects. For example, one study examines changes in the marketplace by comparing multicasting before and after the transition from analog to digital service in the television broadcast industry. A second study focuses on the impact of the Internet. In formulating our proposals and any ultimate rules in this area, we will consider the comments, the findings of our studies, as well as any studies filed by industry, public interest groups, and members of the public.

The Honorable Mike Rogers

1. I am advised that there are currently before the FCC a number of petitions from the providers of payphone services addressing the enforcement of previous Commission orders under Section 276 of the federal Telecom Act. Some of these petitions have been pending for almost seven years awaiting a decision. The petitions purport to seek enforcement of approximately eight prior Commission orders implementing provisions of the federal Communications Act for cost based rates that were supposed to be effective no later than April, 1997.

   First, why would it take so many years for the Commission to determine if its orders have been violated or, if so, to act to enforce its orders? And second, what changes need to be implemented to ensure that Commission decisions are issued and that orders are enforced in a more-timely manner?

   Response:

The Petitions you mention involve complicated legal and factual issues. My understanding is that during the prior FCC administration, an effort was made to facilitate a negotiated resolution of the disputed issues, but that effort was ultimately unsuccessful. Last year, I directed the Wireline Competition Bureau to prepare and circulate to the Commission an order to resolve the longstanding issues raised in these petitions. That order circulated last fall, and has been under consideration by the Commission since. In light of recent discussions with stakeholders and my fellow Commissioners, I am hopeful that these issues can be resolved soon.

2. Following up on the letter Congressman Barrow and I sent regarding the information gathering practices of Google, could you please explain to me your criterion for conducting an investigation and if your office personally monitors progress so that these investigations aren't languishing for years?

Response:

Investigations may be initiated in response to complaints, or on the basis of information that comes to the attention of the Commission from other sources, such as our staff's research. An investigation is generally initiated by a letter of inquiry that requires the target to produce information and documents relating to the possible violation, within a specified time. Our staff reviews the responses and may then send follow-up letters or meet with the target to elicit additional information. In each case, the agency is subject to the statute of limitations set forth at Section 503 of the Communications Act.

3. Once you complete your investigation, how will consumers know what you found? Would you be willing to report back to us your findings so that the record on this issue is clear?

Response:

Once the investigation has been completed, we will be able to determine what information can be shared with the public.

The Honorable Edward Markey

1. In the FCC's schedule for implementing the National Broadband Plan, entitled "Proposed 2010 Key Broadband Action Agenda Items," the FCC listed "Small Business Broadband & Wholesale Competition NOI" to be released in the Fourth Quarter of 2010. It is now the Second Quarter of 2011 and the FCC has not initiated this proceeding. Given the importance to the economy and job creation of small business broadband, why has the FCC not initiated the proceeding? When does the FCC plan on initiating the proceeding? (Note: WC Dkt. No. 10-188)

Response:

Ensuring that the Commission has the right policies in place to protect and promote healthy competition for small business broadband services and generally in wholesale competition markets is a core priority for the agency. Accordingly, the Commission has been developing a record on these issues to determine if our current policies need to be adjusted or reformed. Our information collection has included: a November 2009 public notice seeking comment on the appropriate analytical framework for determining whether our special access rules ensure just and reasonable rates, terms and conditions; a Special Access Workshop in July 2010, which elicited important perspectives on special access pricing; a public notice on the business broadband marketplace, released by the Wireline Competition Bureau in September 2010, in response to which 33 comments and replies from an even larger number of entities provide substantive feedback on a range of issues; and a public notice soliciting data on special access facilities, released by the Wireline Competition Bureau in October 2010. These actions were taken in existing dockets WC Docket No. 05-25, RM 10593 (special access) and WC Docket No. 10-188 (business broadband marketplace). Staff is reviewing the information currently in the record and preparing additional steps to ensure the Commission has a more complete understanding of these important markets.

2. It has now been more than seven years since the FCC initiated the IP-Enabled Services proceeding (WC Docket No. 04-36) in March 2004, in which it set out to determine whether VoIP is a telecommunications services. Unfortunately, the FCC still has not reached a decision on this issue. Given the central importance of this decision to a wide range of issues (such as intercarrier compensation reform, eligibility of competitors for IP interconnection and so forth), why has the FCC not reached a decision? When does the FCC plan on reaching a decision?

Response:

To date, the Commission has expressly classified a VoIP service as a telecommunications service or information service under the Communications Act in two situations. The Commission classified as an "information service" pulver.com's free service that did not provide transmission and offered a number of computing capabilities. *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) (*Pulver Order*).

In contrast, the Commission found that certain "IP-in-the-middle" services were "telecommunications services" where they: (1) use ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originate and terminate calls on the public switched telephone network (PSTN); and (3) offer no enhanced functionality and undergo no net protocol conversion. *Petition for Declaratory Ruling that AT&T's IP Phone-to-Phone Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004). The Commission's approach of differentiating among various types of VoIP services has enabled the Commission to follow a nuanced approach to VoIP.

In addition, although the Commission has not classified interconnected VoIP as a telecommunication or information service, the Commission has extended a number of consumer protection and public safety requirements to interconnected VoIP service. For

example, in 2005, the Commission asserted its ancillary jurisdiction under Title I of the Act, and its authority under section 251(e), to require interconnected VoIP providers to supply 911 emergency calling capabilities to their customers. *VoIP 911 Order*, 20 FCC Rcd at 10246, para. 1.

In 2006, in the *2006 Interim Contribution Methodology Order*, the Commission established universal service contribution obligations for interconnected VoIP providers based on the permissive authority of section 254(d) and its ancillary jurisdiction under Title I of the Act. *See Universal Service Contribution Methodology*, WC Docket No. 06-122; CC Docket Nos. 96-45, 98-171, 90-571, 92-237; NSD File No. L-00-72; CC Docket Nos. 99-200, 95-116, 98-170; WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538-43, paras. 38-49 (2006) (*2006 Interim Contribution Methodology Order*), *aff'd in part, vacated in part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007).

In 2007, the Commission extended the customer privacy requirements of Section 222 to interconnected VoIP providers using Title I authority. *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6954-57, paras. 54-59 (2007) (*CPNI Order*), *aff'd, National Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009).

Also, the Commission used its Title I authority to extend the Section 255 disability access obligations to providers of interconnected VoIP services and to manufacturers of specially designed equipment used to provide these services. *See IP-Enabled Services*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275, 11283-291, paras. 17-31 (2007) (*TRS Order*).

The Commission also extended the Telecommunications Relay Services (TRS) requirements to providers of interconnected VoIP services, pursuant to section 225(b)(1) of the Act and its Title I jurisdiction, thus requiring interconnected VoIP providers to contribute to the Interstate TRS Fund under the Commission's existing contribution rules, and to offer 711 abbreviated dialing for access to relay services. *See id.* at 11291-97, paras. 32-43.

Additionally in 2007, the Commission extended local number portability (LNP) obligations and numbering administration support obligations to interconnected VoIP providers and their numbering partners pursuant to sections 251(e) and 251(b)(2) of the Act and Title I authority. *Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; Numbering Resource Optimization*, WC Docket Nos. 07-243, 07-244, 04-36, CC Docket Nos. 95-116, 99-200, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007) (*VoIP LNP Order*), *aff'd, National Telecomms. Cooperative Ass'n v. FCC*, 563 F.3d 536 (D.C. Cir. 2009).

The Commission has also taken other action related to interconnected VoIP, including working to implement the Twenty-First Century Communications and Video Accessibility Act of 2010 and requiring providers of interconnected VoIP services and broadband Internet

access services to comply with the requirements of the Communications Assistance for Law Enforcement Act (CALEA).

At the same time, by declining to classify interconnected VoIP services as a telecommunications service under the Communications Act, the Commission has not been required to impose legacy common carrier regulations on these new services. The Commission continues to weigh the costs and benefits of its current approach and to consider whether additional changes are necessary, including as part of its ongoing proceedings on reforming the Universal Service Fund and the intercarrier compensation system. *See Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011).

Federal Communications Commission
Office of Legislative Affairs
Washington, D.C.20554

July 28, 2011

Office of the Director

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives
2182 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Walden:

Attached please find the Chairman's supplemental response to the post-hearing questions from his appearance before the Committee on May 13, 2011.

Sincerely,

Greg Guice
Acting Director

Enclosure

QUESTIONS FOR THE RECORD

May 13, 2011 FCC Reform Process Hearing

The Honorable Henry A. Waxman

1. As you know, I am a strong supporter of the Open Internet Order adopted by the Commission on December 21, 2010. Part of my support for the Order is based on the clear recognition that rules to preserve an open Internet do not conflict with reasonable efforts to protect content from online theft.

   Specifically, as Section 8.9 of the adopted rules states: "Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity."[1] The Order further states "[o]pen Internet rules are not intended to affect the legal status of cooperative efforts by broadband Internet access service providers and other service providers that are designed to curtail infringement in response to information provided by rights holders in a manner that is timely, effective, and accommodates the legitimate interest of providers, rights holders, and end users." *See* Order at paragraph 111, footnote 336.

   It is my understanding that Internet service providers (ISPs) and copyright owners have voluntarily entered into negotiations to develop and implement carefully-tailored programs intended to educate ISP customers and raise awareness of the consequences of online copyright infringement. Ideally, this copyright awareness program will curtail copyright infringement activities while preserving a consumer's legitimate online experience.

   More specifically, this copyright awareness program would call for copyright holders to provide publicly accessible information about alleged infringing activities to ISPs, who would then alert their respective customers by forwarding notices of alleged copyright infringement from copyright holders. This would be done in a way to maintain customer privacy. For those customers who receive multiple notices, ISPs could enhance the notification process by using measures intended to increase the likelihood that the customer understands the importance of the issue, including steps that would affect data transmission speeds, redirect customers to a landing page, or require contact with customer care.

   a. What assurances can the FCC give to ISPs that they can enter into voluntary agreements with copyright owners to identify alleged infringement and notify customers – including agreements that involve measures that may temporarily limit or restrict service to customers who are alleged repeat infringers - without running afoul of the Open Internet rules? Do you believe that such agreements are within the scope of the "cooperative efforts" mentioned in footnote 336 of the Order?
   b. Some ISPs are considering the use of a mechanism that would temporarily restrict wireline broadband Internet access service for those customers who have received multiple copyright alerts. Affected customers would be redirected to a "landing page" to review educational materials on copyright infringement prior to the restoration of Internet access service. Once the review is complete, broadband Internet access service would be restored

      Some ISPs may design this redirection process to be triggered only when a customer

seeks to access the most commonly visited websites (as determined by third-party objective criteria). My understanding is that using only the most commonly visited websites as a trigger for redirection to the landing page would allow these ISPs to avoid interference with a customer's use of critical broadband communications such as VoIP or home security, for example, while still maximizing the probability that the customer will review the educational material. Would this approach be permitted under the Open Internet rules? Other ISPs may design the redirection process so that it is triggered when the customer seeks to access any website (i.e., not just the most commonly visited websites). Would this approach, also be permitted under the Open Internet rules?

Response:

As expressed in my July 6, 2011 responses to your questions for the record, I believe that preserving Internet freedom and openness is certainly compatible with protecting intellectual property online, and the *Open Internet Order* affirms the Commission's commitment to that view. *Open Internet Order*, para. 111 & n.336. As you are aware, the discussions among broadband providers and representatives of copyright owners referenced in your question have resulted in a recently announced Memorandum of Understanding (MOU) to address copyright infringement. The MOU provides that a newly created Center for Copyright Information will develop specific methods for fairly implementing the MOU's provisions, in consultation with consumer advocates and subject matter experts.

As you note, the Commission's *Open Internet Order* explicitly anticipated the possibility of cooperative industry efforts like the recent MOU, and the MOU itself is a welcome development. In addressing whether specific methods to be adopted under the MOU raise open Internet issues, the Commission will be guided by the applicable criteria that determine the reasonableness of network management practices, in particular transparency and end-user control, which the MOU also recognizes. Based on my understanding that the proposals in the MOU would use only publicly available information to identify apparent infringers, provide effective notice to affected Internet users, fully disclose relevant network practices or measures, and rely on neutral operational criteria, the MOU appears consistent with the *Open Internet Order*. I look forward to the Center's specific recommendations, and I hope that this voluntary agreement succeeds in reducing unlawful copyright infringement while respecting the legitimate interests of Internet users.

Questions for the Record for
FCC Commissioner Michael J. Copps
Hearing on "FCC Process Reform"
May 13, 2011

Questions from the Honorable Anna G. Eshoo

1. *Do you support enactment of the Federal Communications Commission Collaboration Act (H.R. 1009)?*

   Yes. I enthusiastically applaud introduction of the FCC Collaboration Act and hope to see the bill enacted this year. As I said in my testimony before the Subcommittee, allowing more than two Commissioners to meet outside an open meeting would constitute as great a process reform of our agency as any I can contemplate.

2. *Do you support the Commission holding field hearings for the pending AT&T/T-Mobile merger?*

   Yes. I always support the Commission getting outside the Beltway and hearing from the citizens and consumers who have to live with the consequences of the decisions we make in Washington. That is all the more true for a transaction of this size and scope which carries with it such huge potential to fundamentally alter our country's wireless landscape.

3. *Would the addition of an electrical engineer or computer scientist to your staff help improve the decision-making process?*

   Yes. While it is true that our agency employs many technical experts—including engineers, economists, and computer scientists—who serve as resources for every Commissioner during our deliberations, I believe technology is such a dynamic force nowadays that having an in-office engineer or computer scientist would expedite our examination of these highly complex issues and enhance the ability of my office to serve the public interest.

Questions from the Honorable Henry A. Waxman

1. *Are you concerned that having statutorily prescribed deadlines could undermine the FCC's ability to act more quickly on certain matters?*

   In many instances, Congress does give the Commission a specific deadline for reports or new rules to implement changes in law. Having the pressure of a deadline can be a good thing, pushing all stakeholders to work closely with the FCC because they know a decision is coming. But I also believe that the FCC does need to preserve some flexibility in dealing with the complex and multi-faceted issues coming before us. And, ironically, strictly-prescribed periods for

review could sometimes artificially ***inflate*** the time needed for comment or deliberation on a consensus issue, or in the alternative, rush the Commission's analysis of all the relevant facts and data essential to making good decisions.

2. *Do you believe that the FCC should be required to make proposed final rules public before Commissioners have a chance to vote on adoption? Should the proposed text of an order also be made public before Commissioners vote? How would such publication help or hinder your deliberation? Regarding the FCC's merger review authority, do you agree or disagree with the following statement from former Chairman Powell when he testified before the Energy and Commerce Committee in 2000: "There are communications policies that may be implicated by a license transfer that are not encompassed in antitrust statutes and, thus, given little consideration by antitrust authorities. The classic example is the impact on 'diversity of voices,' when media licensees merge. Congress has often chosen to protect such values, even where a consolidation might not raise classic concentration concerns."*

   In cases where the Commission is considering an item of major national importance, it is appropriate, I believe, to release the final draft of our items before we vote. Ideally this would be the verbatim final text, but I can appreciate that last minute editorial corrections, or even new information, might compel some minor revision to the item before it is voted. In my ten years at the FCC, the Commission has not always lived up to our duty to allow an adequate period of time for the public to comment and to make public, wherever possible, the text of proposed rules. On this score, the current Commission is doing a much better job than many of its predecessors—83% of our Notices of Proposed Rulemaking have included the language of the proposed rules. What we should not have, however, is decision-making deferred indefinitely by a never-ending cycle of comments and revisions. At some point, the Commissioners have to do their jobs and be the "deciders".

   I agree with the statement from former Chairman Powell—the Communications Act gives the FCC broad responsibility that goes beyond antitrust review when evaluating a proposed transaction. In order for the FCC to grant approval of a merger, the applicants must prove that the transaction will serve the public interest, convenience and necessity. In so doing, the FCC looks to the goals set by Congress in the Communications Act, including protecting the safety and security of the people, promoting consumer choice through competition, and preserving and advancing universal service.

Questions from the Honorable Edward Markey

1. *In the FCC's schedule for implementing the National Broadband Plan, entitled "Proposed 2010 Key Broadband Action Agenda Items," the FCC listed "Small Business Broadband and Wholesale Competition NOI" to be released in the Fourth Quarter of 2010. It is now the Second Quarter of 2011 and the FCC has*

not initiated this proceeding. Given the importance to the economy and job creation of small business broadband, why has the FCC not initiated the proceeding? When does the FCC plan on initiating the proceeding?

We know that small businesses are the engines of job creation in this country and that access to broadband can expand small business productivity and growth. The timing of the proceeding is not under my control, but I certainly support the National Broadband Plan's recommendation that the Commission examine the choices and affordability of broadband services available to small businesses and that it do so expeditiously.

2. *It has now been more than seven years since the FCC initiated the IP-Enabled Services proceeding (WC Docket No. 04-36) in March 2004, in which it set out to determine whether VoIP is a telecommunications services. Unfortunately, the FCC still has not reached a decision on this issue. Given the central importance of this decision to a wide range of issues (such as intercarrier compensation, eligibility of competitors for IP interconnection and so forth), why has the FCC not reached a decision? When does the FCC plan on reaching a decision?*

I agree that it is long past time for the Commission to address the classification of VoIP service. The timing of the proceeding is not under my control, but I support the Commission moving forward to provide regulatory certainty in this area. It is a vitally important determination for this Commission to make.

Subcommittee on Communications and Technology
Hearing on FCC Process Reform
May 13, 2011
Additional Questions for the Record

Answers from Commissioner Robert M. McDowell
June 17, 2011

The Honorable Anna G. Eshoo

1. Do you support enactment of the Federal Communications Commission Collaboration Act (H.R. 1009)?

   As discussed at the hearing, the Commission's deliberations would benefit by allowing all five commissioners to get together to try to figure out where we agree and where we disagree. This change to the Sunshine in Government Act would speed the process and breed more collegiality.

2. Do you support the Commission holding field hearings for the pending AT&T/T-Mobile merger?

   Yes. Given the size and scope of the proposed transaction, our work will benefit from additional opportunities for input from the public.

3. Would the addition of an electrical engineer or computer scientist to your staff, help improve the decision-making process?

   This addition would increase the FCC budget and is not necessary. Throughout my tenure, I have enjoyed a positive and enjoyable working relationship with Julius Knapp, our Chief of Office of Engineering and Technology (OET) and his entire team of in-house engineers and technologists. OET is an invaluable resource to my staff and me – incredibly knowledgeable, not to mention responsive – on engineering and IT matters.

The Honorable Henry A. Waxman

1. Are you concerned that having statutorily prescribed deadlines could undermine the FCC's ability to act more quickly on certain matters?

   I operate under the philosophy that Congress should tell us what to do and not the other way around. Therefore, when FCC proceedings have statutory deadlines, I take them very seriously. Additionally, regarding deadlines in general, I think it would be helpful for the FCC to adopt and adhere to internally imposed shot clocks, with appropriate flexibility.

2. Do you believe that the FCC should be required to make proposed final rules public before Commissioners have a chance to vote on adoption?

   Chairman Genachowski has made good progress ensuring that notices of proposed rulemaking contain actual proposed rules, and I applaud his efforts. As far as also making the proposed final rules public prior to a vote, several questions would have to be addressed if such a practice was implemented. For instance, would such a procedure then trigger an additional comment cycle and, if so, how long should such a comment cycle extend? Also, FCC rules regarding unauthorized disclosures would likely require amendment. Specifically, 47 C.F.R. § 19.735-203 bars the disclosure of any FCC nonpublic information such as the

contents of agenda items to anyone outside of the Commission. Final rules are within the category of "contents of agenda items" and would therefore be subject to such a bar from disclosure.

Should the proposed text of an order also be made public before Commissioners vote?

In addition to rules (discussed immediately above), making the text of orders public raises a number of questions and would require amending the Commission's rules against unauthorized disclosure. For instance, as mentioned previously, FCC rules bar unauthorized disclosure of any FCC nonpublic information. Similar to final rules, the text of an order also would fall within the category of items that may not be disclosed to anyone outside of the FCC pursuant to 47 C.F.R. § 19.735-203. As such, our disclosure rules likely would need to be amended to allow for the release of orders prior to a vote.

How would such publication help or hinder your deliberation?

On the one hand, such a change may improve transparency. As mentioned previously, however, such a change in procedure would likely trigger an additional comment cycle and ultimately delay the effective date of certain policy initiatives. Also, as discussed above, certain FCC rules regarding unauthorized disclosures would require amendment.

Regarding the FCC's merger review authority, do you agree or disagree with the following statement from former Chairman Powell when he testified before the Energy and Commerce Committee in 2000: "There are communications policies that may be implicated by a license transfer that are not encompassed in antitrust statutes and, thus, given little consideration by the antitrust authorities. The classic example is the impact on "diversity of voices," when media licensees merge. Congress has often chosen to protect such values, even where a consolidation might not raise classic concentration concerns."

I agree. First and foremost, Congress has determined that the FCC should have a role in merger reviews and requires the FCC to conduct a full review. In fact, Section 309(d)(2) of the Act requires that, when pleadings regarding a pending application are filed, the Commission must "issue a concise statement of the reasons" for "denying the petition(s)" and shall "dispose of all substantial issues raised by the petition." Some of those issues are communications policies that do not relate to the antitrust statutes. Additionally, as the expert agency on communications matters, Congress has required the FCC to prepare reports on various sectors on the communications industry, which can be useful in the FCC's review of license transfers.

The Honorable Edward Markey

1. In the FCC's schedule for implementing the National Broadband Plan, entitled "Proposed 2010 Key Broadband Action Agenda Items," the FCC listed "Small Business Broadband & Wholesale Competition NOI" to be released in the Fourth Quarter of 2010. It is now the Second Quarter of 2011 and the FCC has not initiated this proceeding. Given the importance to the economy and job creation of small business broadband, why has the FCC not initiated the proceeding? When does the FCC plan on initiating the proceeding? (Note: WC Dkt. No. 10-188)

   As this question involves the timing of a possible action item, it is best addressed to Chairman Genachowski.

2. It has now been more than seven years since the FCC initiated the IP-Enabled Services proceeding (WC Docket No. 04-36) in March 2004, in which it set out to determine whether VoIP is a telecommunications services. Unfortunately, the FCC still has not reached a decision on this issue. Given the central importance of this decision to a wide range of issues (such as intercarrier compensation reform, eligibility of competitors for IP interconnection and so forth), why has the FCC not reached a decision? When does the FCC plan on reaching a decision?

   As this question involves the timing of a possible action item, it is best addressed to Chairman Genachowski.

Questions for the record following the *FCC Process Reform* hearing on May 13, 2011

Responses by FCC Commissioner Mignon L. Clyburn

The Honorable Anna G. Eshoo

1. Do you support enactment of the Federal Communications Commission Collaboration Act (H.R. 1009)?

Yes, as H.R. 1009 would be a significant improvement in our deliberative process.

Recently, the National Association of Regulatory Utility Commissioners (NARUC) praised the introduction of this legislation and offered its support for it. However, NARUC did note the need for one minor change to the legislation in order to improve its effectiveness with respect to the federal Commissioners' participation on the federal-state Joint Boards and the Joint Conference, and I agree with its observation.

The Joint Boards and Joint Conference both have federal and state representation, and each is involved in the Commission's policymaking process with respect to their subject matter focus in the areas of universal service, jurisdictional separations, and advanced services. Under current law, three or more Commissioners may not participate in a Joint Board or Joint Conference meeting, unless they are open to the public and have been properly noticed.

Currently, federal Commissioners must take turns participating in our in-person and conference call meetings. This has made it extremely difficult for constructive and efficient deliberations when it comes to Joint Board Recommended Decisions. NARUC's letter makes this same observation, and I join in my support of its request that H.R. 1009 include language to extend the proposed Sunshine Act exemption to cover FCC Commissioners who participate on the Joint Boards and Conference. It is crucial that as we consider how to reform FCC process, we also think about how to improve our Joint Board and Joint Conference rules.

2. Do you support the Commission holding field hearings for the pending AT&T/T-Mobile merger?

Yes, I believe that the Commission should go on the road and hear from consumers who would be affected by this merger. I currently am working with the Chairman's office to identify locations for the Commission to hold field hearings.

Several reasons support the Commission holding field hearings on this pending license transfer proceeding. First, holding hearings in communities outside of D.C. would provide greater insight on some of the key questions in this proceeding. For example, one of the critical issues is whether the proposed merger would create competitive harm in the mobile wireless market. While D.C. area residents, like those who live in most urban communities, currently enjoy several options for their mobile services, the same cannot be said of many rural areas in our nation. Accordingly, the impact on competition will be different in many rural areas than it would be in DC and other urban areas. In order to have a better idea of the potential impact of

the merger, we should seek the opinion of those who live in the most sparsely populated areas of the U.S. and who do not have easy access to visit the Commission and give us their perspective on the proposed merger.

Second, field hearings would promote openness and transparency. Under Chairman Genachowski's leadership, the Commission has taken a number of steps, like creating the Spectrum Dashboard, to promote transparency. Holding a public hearing on this proceeding, would be another important step. It would help show the American public, who may not be very familiar with the FCC's work, how we go about reviewing the complicated issues involved in a proposed merger of historic proportions in deciding whether it would promote the public interest.

3. Would the addition of an electrical engineer or computer scientist to your staff help improve the decision-making process?

Yes, I believe each Commissioner could benefit from the ability to hire an additional professional, either an engineer, economist, or computer scientist. An advisor with technical and/or economics expertise would help me in my decision-making. Often the items I vote are steeped in technical and/or economic analysis, and an expert that resides in my office to assist me would be very beneficial to me and my understanding of the issues.

The Honorable Henry A. Waxman

1. Are you concerned that having statutorily prescribed deadlines could undermine the FCC's ability to act more quickly on certain matters?

In principle, I don't have a problem with deadlines, but they should not rule the process. Our decisions should be based on the facts, law, and the right policy outcomes. There are times when the Commission's review takes more or less time than others. For example, those transactions that don't have competitive overlap typically are streamlined and decided quickly, whereas those transactions that have competitive issues must be carefully reviewed and usually take longer.

2. Do you believe that the FCC should be required to make proposed final rules public before Commissioners have a chance to vote on adoption?

During this Commission, I understand that in over 80% of the rulemakings we have issued, the Notices contained proposed rules for comment. There may be times that the Commission would need to add rules or modify the rules based on public comment received during the Notice period or as an interim measure, so I would be concerned that a publication requirement may not properly consider all the possible exceptions that would need to be identified.

3. Should the proposed text of an order also be made public before Commissioners vote? How would such publication help or hinder your deliberation?

I worry about how such a requirement may influence the ability of Commissioners to use their three weeks for consideration and discussion of the item with staff and the other Commissioner's offices in a productive manner, and I am concerned that the deliberation of items could end up being delayed as a result.

I also worry about what the obligations would be for the Commission to explain departures from the draft when changes are made to the final order. I am not aware of other federal, independent agencies doing this, and I think about how other bodies, such as courts do not publish a circulated decision that's still under review and consideration. I think publication of drafts may end up causing more harm than good.

4. Regarding the FCC's merger review authority, do you agree or disagree with the following statement from former Chairman Powell when he testified before the Energy and Commerce Committee in 2000: *"There are communications policies that may be implicated by a license transfer that are not encompassed in antitrust statutes and, thus, given little consideration by the antitrust authorities. The classic example is the impact on 'diversity of voices,' when media licensees merge. Congress has often chosen to protect such values, even where a consolidation might not raise classic concentration concerns."*

Yes, the charge this Commission has to review transactions encompasses much more than antitrust law, and we have a duty to ensure that the transfer of licenses or authorizations is consistent with the statute and our rules and policies.

The Honorable Edward Markey

1. In the FCC's schedule for implementing the National Broadband Plan, entitled "Proposed 2010 Key Broadband Action Agenda Items," the FCC listed "Small Business Broadband & Wholesale Competition NOI" to be released in the Fourth Quarter of 2010. It is now the Second Quarter of 2011 and the FCC has not initiated this proceeding. Given the importance to the economy and job creation of small business broadband, why has the FCC not initiated the proceeding? When does the FCC plan on initiating the proceeding?

I recently stated that small businesses are the engines that run America. I owned and operated a small newspaper for 14 years, and am keenly aware of how difficult it is to build a business, serve a market, and turn a profit. I am also extremely cognizant of the massive positive impact broadband has had since the time I closed the doors on my business. Broadband is now essential to small companies, and that thought is in the front of my mind.

The FCC has done workshops and listened to stakeholders regarding the state of broadband competition, and I trust we will continue to do so as often and as constructively as possible.

2. It has now been more than seven years since the FCC initiated the IP-Enabled Services proceeding (WC Docket No. 04-36) in March 2004, in which it set out to determine whether VoiP is a telecommunications services. Unfortunately, the FCC still has not

reached a decision on this issue. Given the central importance of this decision to a wide range of issues (such as intercarrier compensation reform, eligibility of competitors for IP interconnection and so forth), why has the FCC not reached a decision? When does the FCC plan on reaching a decision?

I hope we come to a complete decision soon, and this issue has been teed up again in the pending NPRM on USF and ICC reform. As you know, we have taken tangential steps, related to CALEA and the 21st Century Communications and Video Accessibility Act, and in the interests of consumer protection and public safety. I hope we continue to pursue clearer rules regarding interconnected VoIP service.

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