

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
 COMMITTEE ON ENERGY AND COMMERCE
 2125 RAYBURN HOUSE OFFICE BUILDING
 WASHINGTON, DC 20515-6115

Majority (202) 225-2927
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MEMORANDUM

April 29, 2015

To: Subcommittee on Communications and Technology Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Subcommittee Hearing on “FCC Reauthorization: Improving Commission Transparency”

On Thursday, April 30, 2015, at 2:00 p.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Communications and Technology will hold a legislative hearing entitled “FCC Reauthorization: Improving Commission Transparency.” The hearing will examine three draft bills circulated by Majority members of the Subcommittee on April 21, 2015.

I. BACKGROUND ON THE FCC

The Federal Communications Commission (FCC) is an independent federal agency established by the Communications Act of 1934, as amended (the Act). The FCC issues rules consistent with guidelines in the Administrative Procedure Act (APA). The APA applies to all federal executive departments and independent federal agencies. Enacted in 1946 to establish consistency and predictability, the APA provides the opportunity for the public to participate in agency decision and rulemaking across the federal government.

II. RECENT IMPROVEMENTS IN FCC PROCESS

FCC Chairman Wheeler has made it a priority since the beginning of his tenure in November 2013 to improve the efficiency and transparency of the agency’s processes. Immediately upon taking office, Chairman Wheeler directed a top advisor to develop process reform recommendations. Initial recommendations included streamlining agency processes and data collections; eliminating or streamlining outdated rules; improving interactions with external stakeholders; and improving the internal management of the agency.¹ The Commission sought comment from stakeholders on the proposed recommendations, and is actively working toward

¹ Federal Communications Commission, *Report on FCC Process Reform* (Feb. 14, 2014) (online at www.fcc.gov/article/da-14-199a2).

implementing reforms.

The FCC also has made progress reducing backlogs of petitions, applications, complaints and requests pending before the agency. Since May 2014, the volume of items pending before the agency for more than six months has been reduced by over 44%.² In addition, the FCC has prioritized releasing its decisions to the public as quickly as possible; 85% of items are publicly released within two business days of adoption. Building on these efforts, Chairman Wheeler announced a new Process Reform Task Force last month at a hearing before the subcommittee. The Task Force will consider additional reform proposals and include staff from other commissioners' offices.

III. LEGISLATION IN THE 113th CONGRESS

In March 2014, the House passed H.R. 3675, the FCC Process Reform Act. Administrative law experts testified that by removing the FCC from APA standards, the bill, as introduced, would have created significant uncertainty, litigation risk, and higher transaction costs.³ As a result of bipartisan negotiations in Committee, Democrats were able to address several areas of concern in the bill as introduced. The bill reported out of the Energy and Commerce Committee and passed by the House directed the FCC to examine a number of potential process reforms and included the text of the FCC Collaboration Act to allow FCC Commissioners greater flexibility to deliberate amongst themselves.

IV. FCC PROCESS REFORM DRAFT LEGISLATION IN THE 114th CONGRESS

In the past few weeks, Republicans have released three new discussion draft bills changing FCC processes and rules of procedure. Like the bill introduced in the last Congress, two of these drafts conflict with existing provisions of laws already in effect, including the APA.

The APA has been a successful bedrock of regulatory law in large part because it reaches and applies across federal agencies. As a result of a standard body of case law interpreting the APA, the public and interested stakeholders benefit from increased certainty. This committee has heard extensive testimony from administrative law experts that removing the FCC from the predictability of the APA could lead to years of litigation.⁴ This committee has heard repeatedly over the past few months that litigation can inject uncertainty into the market and could deter investment.

A. Rep. Kinzinger Discussion Draft

This bill will require FCC to publish on its website draft documents to be voted on by the

² Letter from Chairman Wheeler to Chairman Walden (Apr. 16, 2015).

³ House Committee on Energy and Commerce, *Hearing on "Improving FCC Process,"* Subcommittee on Communications and Technology, 113th Cong. (July 11, 2013).

⁴ See Testimony of Stuart Minor Benjamin before the Committee on Energy and Commerce Subcommittee on Communications and Technology (July 11, 2013) at 2; Testimony of Richard J. Pierce, Jr. before the Committee on Energy and Commerce Subcommittee on Communications and Technology (July 11, 2013) at 2-7.

Commission three weeks before the open meeting. This proposal echoes a letter the Republicans sent to FCC Chairman Wheeler in January 2015, asking him to release his draft network neutrality order before the other Commissioners had an opportunity to review it.⁵

The requirement outlined in this discussion draft, that the FCC release pre-decisional drafts runs counter to the policy underlying an exemption to the Freedom of Information Act (FOIA) for internal deliberative processes of an agency.⁶ By creating a potential conflict of law with FOIA, this bill could increase the risk of litigation for many FCC actions.

Posting draft documents could spark an unending cycle of lobbying on successive draft items. Specifically, any new arguments raised in the record in response to the draft text could force the agency to trigger a new round of notice and comment. These cycles of lobbying could undermine the ability of commissioners, who are in the minority on any given agenda item vote, to negotiate changes in a draft once it has been made public.

B. Rep. Ellmers Discussion Draft

This bill would require the FCC to publish on its website any changes to the Commission's rules not later than 24 hours after adoption. The draft legislation is in potential conflict with the APA, which requires an agency to release explanatory text along with any new rules.⁷ For each provision that appears in the Code of Federal Regulations, the explanatory text is vital to understanding the actual rules. This bill would separate the two, creating confusion and uncertainty for stakeholders.

C. Rep. Latta Discussion Draft

This bill requires the FCC to publish information on its website 48 hours before making a decision on "delegated authority." Specifically, notice would be required on every delegated authority decision made by a commission bureau.

Delegated authority allows the heads of FCC bureaus and offices to make decisions so long as new legal issues are not presented. As a practical matter, delegated authority is

⁵ Letter from Reps. Fred Upton, Rep. Greg Walden, and Senator John Thune to FCC Chairman Tom Wheeler (Jan. 22, 2015).

⁶ See Department of Justice Guide to Freedom of Information Act, 366 (online at www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5_1.pdf) (explaining that the Freedom of Information Act protects inter-agency work product to "(1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action").

⁷ 5 U.S.C. §553(c) (requiring agencies to "incorporate in the rules adopted a concise general statement of their basis and purpose"); see also Federal Register Guidance at www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (instructing agencies to include a number of explanatory sections along with new rules).

overwhelmingly used to conduct routine agency business, like application processing and issuing public notices. Thousands of actions are taken on delegated authority on a yearly basis. These actions are not final until they are released by the FCC, and the FCC can decide not to take an action at any time before it releases the item.

The actions contemplated in the draft bill go far beyond the informal policies and practices in place at the FCC. Under FCC's informal procedures, commissioners are notified 48 hours before bureaus take action on items that the Chairman's office believes may be of interest to the commissioners. This procedure is designed to balance the need to keep commissioners informed while not overwhelming them with notice about each of the thousands of routine actions taken by the bureaus.

Requiring the agency to post a description of all potential actions before they are finalized could instead create confusion. By generating public lists of actions the agency may not actually take, unwarranted administrative burdens would be imposed upon the FCC and it could increase unnecessary uncertainty and anxiety among the public and interested commenters. Adding this new notice requirement at the bureaus level could have the perverse effect of slowing down the work of the FCC and dramatically reducing its productivity. Accordingly, stakeholders could also face uncertainty and longer wait times for what previously have been routine decisions.

V. WITNESSES

The following witnesses have been invited to testify:

The Honorable Tom Wheeler
Chairman
Federal Communications Commission

The Honorable Michael O'Rielly
Commissioner
Federal Communications Commission