

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

May 14, 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 Part II”

On Friday, May 15, 2015, at 9:15 a.m. in room 2322 of the Rayburn House Office Building, the Subcommittee on Communications and Technology will hold a legislative hearing entitled “FCC Reauthorization: Improving Commission Transparency Part II.” The hearing will examine three of the five draft bills circulated by Minority members of the Subcommittee on April 30, 2015, as well as examine the language from the FCC Process reform bill passed by the House in the 113th Congress (H.R. 3675). This is the second hearing in two weeks on FCC process issues.

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 Initial recommendations included streamlining agency processes and data collections; eliminating or streamlining outdated rules; improving interactions with external stakeholders; and improving the internal management of the agency.¹ The Commission sought

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

comment from stakeholders on the proposed recommendations, and is actively working toward 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 in March at a hearing before the subcommittee. The Task Force will consider additional reform proposals and include staff from other commissioners' offices.

The Chairman's testimony on April 30, 2015, further outlined the extensive progress that has been made to provide additional transparency and improve efficiency at the FCC under Chairman Wheeler. Specifically, he noted that since last year, the FCC closed more than 1,500 dormant dockets, the Enforcement Bureau closed nearly 8,000 cases, the Wireless Telecommunications Bureau resolved over 2,000 applications older than 6 months, and the Media Bureau reduced by 57% its pending applications for review. Additionally, the Chairman noted the creation of the new consumer complaint database, webpage redesign efforts, and expanded electronic filing as additional efforts. The Chairman committed to working with the other commissioners on additional ideas for additional reforms.

III. FCC PROCESS REFORM ACT OF 2015

The May 15, 2015, hearing will seek input on the FCC Process Reform Act language passed out of the House last Congress in addition to the three Democratic discussion drafts noted below. The FCC Process Reform discussion draft released by the Majority on May 8, 2015, is substantively identical to the bill language from last Congress.³

The major provisions of the bill would require the FCC to:

- (1) Complete a rulemaking proceeding to adopt procedural rule changes to maximize opportunities for public participation;
- (2) Complete an inquiry on whether and how the FCC should establish procedures where a bipartisan majority of commissioners can place an item on an agenda, as well as other procedural changes including establishing deadlines for application processing;
- (3) Provide information on the FCC webpage regarding budget;

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

³ In March 2014, the House passed H.R. 3675, the prior Congress's version of the FCC Process Reform Act. Administrative law experts testified at those hearings that by removing the FCC from APA standards, the bill, as introduced, would have created significant uncertainty, litigation risk, and higher transaction costs. See House Committee on Energy and Commerce, *Hearing on "Improving FCC Process,"* Subcommittee on Communications and Technology, 113th Cong. (July 11, 2013). As a result of bipartisan negotiations in committee, the minority was able to address several areas of concern in the bill as introduced.

- (4) Create a consumer complaint database;
- (5) Modify FOIA performance; and
- (6) Release annual performance reports.

The Discussion Draft also includes a 4-year extension from the Anti-deficiency Act for the Universal Service Fund and the text of the FCC Collaboration Act (H.R. 1396), which was introduced by Rep. Eshoo. H.R. 1396 would allow for two or more commissioners to discuss FCC business outside of an FCC Open Meeting, but provides sufficient safeguards to protect against abuse. H.R. 1396 was one of the specific Democratic process reform proposals from the April 30, 2015, hearing, and it will be considered as a part of the broader FCC Process Reform Act.

IV. DEMOCRATIC FCC PROCESS REFORM DISCUSSION DRAFTS

At the April 30, 2015, hearing on FCC transparency, Democratic members suggested alternative language designed to ensure that the FCC remain fast, efficient, and transparent without creating unnecessary risk of litigation. The May 15, 2015, hearing will provide experts the opportunity to comment on three of the Democratic discussion drafts related to FCC reform.

A. Rep. Clarke – FCC Accountability Discussion Draft

Notwithstanding the FCC's impressive progress over the past several years to more quickly issue rules and close pending matters, the best way to ensure that future FCC administrations live up to these newer benchmarks is to hold the FCC accountable to the public. The public deserves timely responses from the FCC whether it is related to an application or a request for new rules.

Rep. Clarke's discussion draft would require the FCC to report quarterly to Congress – and to post on its website – data on the total number of decisions pending categorized by bureau, the type of request, the length of time pending, as well as a list of pending Congressional investigations and their costs to the agency.

B. Rep. Matsui – Small Business Participation Discussion Draft

The FCC oversees industries that account for one sixth of the economy, which includes countless small businesses. Small businesses in every community throughout the country are impacted by many of the decisions and rules that the agency adopts.

Rep. Matsui's discussion draft would make it easier for the voices of small businesses to be heard with greater consistency and regularity at the FCC. In particular, her bill would require the FCC to coordinate with the Small Business Administration to develop recommendations to improve small business participation in FCC proceedings.

C. Rep. Loebsack – Internal Processes Discussion Draft

Public participation at the FCC is at an all-time high with millions of Americans reaching out to the FCC. Those small businesses and consumers should have as much visibility into the operations of the FCC as the big corporate interests and their high-priced telecommunications

lawyers here in Washington, D.C.

Rep Loeb sack's discussion draft would afford these constituencies and stakeholders, many of whom are small businesses and consumers, greater visibility into the FCC's operations. In particular, his bill would require the FCC chairman, as the head of the agency, to post the Commission's internal policies and procedures on the FCC website and to disclose any modifications within 48 hours.

V. KEEPING OUR CAMPAIGNS HONEST ACT (H.R. 2125)

The fifth bill offered by the committee Democrats, as part of their effort to increase FCC transparency, was the Keeping Our Campaigns Honest (KOCH) Act (H.R. 2125), which Rep. Yarmuth introduced on April 30, 2015. Although this bill was not specifically noticed for the May 15, 2015, hearing, that bill would increase transparency for broadcasting viewers and listeners by directing the FCC to modify its sponsorship identification rules to require the disclosure of significant donors to entities or persons purchasing issue advertisements.

VI. WITNESSES

The following witnesses have been invited to testify:

Stuart M. Benjamin

Douglas B. Maggs Chair in Law and Associate Dean for Research
Duke Law

Robert M. McDowell

Former FCC Commissioner, Senior Fellow
Hudson Institute

Randolph J. May

President
Free State Foundation