

TESTIMONY OF  
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Before the  
**COMMITTEE ON ENERGY AND COMMERCE**  
**SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY**  
of the  
**UNITED STATES HOUSE OF REPRESENTATIVES**

on  
*FCC REAUTHORIZATION: IMPROVING COMMISSION TRANSPARENCY PART II*  
May 15, 2015

Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, thank you for the opportunity to testify before you today.

The Commission and its processes have been at the center of my academic career. My core research and teaching areas are telecommunications law, administrative law, and the First Amendment. I have written many law review articles on these topics and am the coauthor of *Telecommunications Law and Policy*, a legal casebook now in its fourth edition. From 2009 to 2011 I was the inaugural Distinguished Scholar at the Commission. More recently I have been periodically serving the Commission as a consultant. I should add that I have not discussed my testimony or the bills at issue today with anyone at the Commission. Beyond that, I am not being compensated for my testimony in any way, either directly or indirectly. I have no clients (paid or unpaid), nor have I had any clients or consulting relationships since I became an academic in 1997.

I will refer to the Federal Communications Commission Process Reform Act of 2015 as “the bill,” and the section numbers I list below will refer to that bill. But I will touch on the other bills that you are considering as well.

There is much to be said for the bills you are considering. Agencies’ processes are tremendously important, and I think you are wise to carefully consider those processes. All the bills, including the four bills that are the focus today and the three bills on which this Subcommittee’s April 30 hearing focused, avoid many of the most serious concerns I raised about the Federal Communications Commission Process Reform Act of 2013, on which I testified before you in July 2013. I think it makes a great deal of sense to direct the Commission to develop rules, rather than to have Congress impose specific rules. Congress thus makes the central policy choices and the agency writes rules to implement them. Beyond that, the bills largely avoid creating novel legal regimes and wisely focus on disclosure. Disclosure is not costless, of course. As I will note below, some disclosures can do more harm than good, because they inhibit effective decisionmaking processes. But many forms of disclosure, including many in the bills you are considering, have little or no such inhibiting effects and more generally have modest costs. Such disclosures can have real benefits, in terms of public confidence and congressional oversight, and thus are attractive. The draft bills of Representative Clarke, Representative Loeb sack, and Representative Matsui may fall into this category.

I do have some modest reservations about aspect of the bills you are considering, to which I now turn.

## **Specificity to the FCC**

One basic point that I raised in 2013 remains: If the proposals are a good idea, they should not be limited to the FCC. One of the great advantages of the Administrative Procedure Act (“APA”) is that it applies the same rules to all agencies, allowing agencies to learn from each other and leading to the development of a jurisprudence that applies to all agencies. The goals underlying many provisions of the bill would seem to apply with equal force to all agencies, and there is no obvious reason why these provisions should be limited to the FCC. Applying them only to the FCC moves away from the APA’s valuable unification of agency procedures and standards.

For instance, let me highlight the provision in the bill that I most strongly support. Section 13(c), allowing nonpublic collaborative discussions, is a great idea. I think virtually every administrative lawyer and law professor would agree that disclosure requirements entailed in 5 U.S.C. § 552b have hampered effective communications among Commissioners and should be modified. It is inefficient that Commissioners cannot have meaningful substantive discussions among themselves outside of public Commission meetings and so must send their staffs to consult and coordinate. But the arguments for this proposal apply to all multimember agencies. I do not see any reason why new rules on nonpublic collaborative discussions should be limited to the FCC.

## **Uncertainty**

As I noted above, the bills you are considering ameliorate many of the concerns I raised in 2013 about novel legal requirements that open the door to litigation and uncertainty. But a few

of the provisions give rise to similar concerns. For instance, the Commission will have to define what constitutes “extensive new comments” (a term that does not appear in the United States Code) in § 13(a)(2)(B), and then await judicial review of its definition and implementation of that term. New legal standards often make sense, because their benefits often outweigh their costs. Maybe the new legal standards in these bills have benefits that exceed their costs. But novelty does give rise to costs in the form of uncertainty and litigation. And limiting the new standards to the FCC will increase this period of uncertainty. With new standards applicable to only one agency, establishing a set of agency practices and set of judicial standards could take years.

### **Review by All Commissioners**

Section 13(a)(3)(C) requires the establishment of procedures to ensure that Commissioners have adequate time to review proposed rules. That seems to be at cross-purposes with another bill you are considering, Representative Kinzinger’s draft bill. That bill requires that proposed rules be published on the Internet within 24 hours of circulation to other Commissioners, and allows only “good faith changes” afterwards. So Commissioners could (along with the public) review proposed rules, but the Commission would have to justify any changes that such review produced. The point at which Commissioners review proposed rules and suggest changes would be the point at which such changes would become more difficult to make. This is, I think, a recipe for less meaningful review by other Commissioners, which is in tension with § 13(a)(3)(C)’s emphasis on increasing Commissioners’ ability to review, and presumably suggest changes to, proposed rules.

## **Adding Rounds to the Process**

Some provisions of the bills you are considering may dramatically extend the rulemaking process. Section 13(a)(2)(C) in particular exemplifies this. It requires the establishment of policies to ensure that the public has notice of and an opportunity to respond to submissions received after the comment period on which the FCC relies. If the Commission wants to rely on any of these responsive submissions, it would be required to disclose these new submissions and afford the public an opportunity to respond to *them*, and so on. (Indeed, reliance does not appear to be necessary: the provision requires the establishment of policies regarding the treatment of submissions “after the comment period to ensure that the public has adequate notice of an opportunity to respond to such submissions before the Commission relies on such submissions.” In other words, an opportunity to respond apparently must exist for all submissions, in case the Commission relies on them. So receipt of submissions appears to entail a requirement of an opportunity for further submissions.) And if a court required the Commission to take a hard look at all the arguments and data in each new set of submissions, the rulemaking process might never conclude. That said, a court might recognize that application of hard look review could create an endless process, and thus treat § 13(a)(2)(C) as weakening hard look review for the FCC in this context (on the reasoning that the specific trumps the general). But then we are back to the problem of having a special set of rules for the FCC – here, modifying one of the core provisions of the APA *sub silentio*.

The Commission could avoid this possibly endless process by refusing to rely on, or even accept, any submissions after the comment window has closed, but I am not sure we want agencies to ignore valuable new data. In an area like telecommunications, new developments are

occurring all the time, and the Commission should rely on the most accurate and up to date information in making its decisions. Simply stated, under § 13(a)(2)(C) the Commission will either face a potentially endless process (submissions leading to responsive submissions, leading to yet further submissions, and so on) or will have to ignore potentially valuable information that becomes available after the comment window has closed.

### **Decisionmaking Before the Public Comment Process Occurs**

Section 13(a)(2)(G)'s provision that a notice of proposed rulemaking shall contain the specific language of the proposed rule will cement the transformation of the rulemaking process into a rule adopting process. In the first decades after Congress enacted the APA, notices of proposed rulemaking were often very brief, and frequently simply outlined the issue and its possible resolution. Starting in the early 1970s, judicial opinions began to require so much information and guidance in notices of proposed rulemaking that agencies were effectively required to do most of their analysis before they issued a notice of proposed rulemaking. One result of these judicial rulings was that the public comment period under § 553 of the APA came after the agency had made the most important decisions, because those decisions were made before the notice was issued. Section 13(a)(2)(G) will largely complete this transformation, as the agency will be required to have written an entire proposed order as part of its notice before the § 553 comment period begins. Some might welcome this transformation, on the theory that there are advantages to the publication of a proposed rule before the public comments, and that it is fine to diminish the role of comments from the public during the rulemaking process because

such comments do not make much difference, anyway. But it is a remarkable transformation from where the rulemaking process started.

I hope these comments have been useful. I will be happy to respond to any questions that you may have.