Statement of Michael O'Rielly, FCC Commissioner
Before the Subcommittee on Communications and Technology
House Energy and Commerce Committee
"**FCC Reauthorization: Improving Commission Transparency"**
April 30, 2015

Thank you, Mr. Chairman, Ranking Member Eshoo and the Members of the Subcommittee for the opportunity to discuss this important topic before you today. I commend the Subcommittee for its continued focus on improving FCC processes, and I recommit to making myself available as a resource if I can be of any assistance to the Subcommittee on this or any other issue in the future.

Reforming Commission procedures is something that I have worked on for quite a while. In fact, I participated in at least two major legislative efforts during my Congressional staff tenure to reauthorize the FCC, with each containing mechanisms to improve the FCC's process. None of that was enacted into law. Moreover, having served at the FCC for nearly 18 months, I have had the chance to experience FCC procedures firsthand. Over the years, and certainly during my time at the Commission, I've also had the opportunity to speak with a number of stakeholders about areas that could be improved. Based on these interactions and my personal experiences, I believe that a number of FCC practices are in need of review and reform. I have used my public blog to highlight a number of these issues, and I plan to continue this as needed or as problems come to light.

I am also pleased to work with the Chairman, my fellow Commissioners and staff on process reform. During my time, I have applauded the Chairman for efforts to improve the internal workings of the Commission through the efforts of Diane Cornell and other Commission staff, in areas such as reducing backlogs, closing dormant proceedings and expanding electronic filing opportunities. I am hopeful that the Commission can make the same meaningful improvements to the overall process for items considered by the Commissioners (the so-called "Eighth Floor" process). The Chairman has initiated a new Process Review Task Force to examine these procedures and I am anxiously awaiting the pro-active reform proposals that may result. Nonetheless, we take our guidance from Congress and our effort should not undermine or circumvent any legislative effort you may pursue. To the extent that we can implement reforms prior to Congressional action, it would still be helpful for Congress to codify any changes into law.

I hope to caution anyone who may view my pursuit as related to any particular item considered by the Commission. In fact, some have posited that reforming the FCC procedures is somehow tied to the outcome of the recent Net Neutrality proceeding. While it is accurate that I did not agree with its direction or content, my interest in improving our overall processes far preceded that specific item. For instance, my blog post recommending that items be made publicly available at the same time they are circulated to Commissioners was published in August 2014. Moreover, every process lesson that could be learned from the Net Neutrality proceeding can be gathered from other, unrelated items. In other words, these are not one-time problems but repeating themes. And, the practices that I believe should be altered are not exclusive to the current Commission but have been developing over some time.

I know some people, including the Chairman, have interest in reviewing the practices of other independent federal agencies. This is commendable, but I am not sure it is all that enlightening because each agency comes with its own operating statute that can differ tremendously for numerous reasons. Moreover, our federal agencies are overseen by different Congressional committees, reflecting different responsibilities and thus practices. Even in those instances where agencies are overseen by one

committee, such as the Energy and Commerce Committee, there are differences in their procedures. For example, unlike the FCC, the Federal Trade Commission assigns items to different Commissioners, even those in the minority, to take the lead. I would suggest that the standard to be used in considering any proposed change be based on what is in the best interest of the American people and the communications marketplace, not what is common with our brethren federal agencies. It would seem to be unreasonable to set a premise that the only changes that can be made are those that mimic the procedural practices of other agencies. It is also hard to fathom that the only time FCC procedures can be changed is when all other similarly situated agencies are changed as well.

In terms of the specific legislative proposals before the Subcommittee, I generally refrain from commenting on legislation. Since you have invited me to testify before you, I will say that I appreciate the ideas being discussed by the Subcommittee, which would address the transparency of FCC actions and its extensive use of delegated authority, and I am prepared to offer technical assistance. In general, I believe that the proposed changes, as well as others, would improve the functionality of the FCC and improve access to information by consumers and the companies that do business before the FCC.

Publication of Draft Commission Items

As you may know, one of the most frustrating aspects of FCC rulemakings, from both an internal and external perspective, is that the notices and orders voted on by the FCC are not made public until after the vote, and sometimes not for days or weeks after a decision is made. As a former Congressional staffer accustomed to seeing drafts circulated publicly in advance of legislative hearings and markups, this FCC process struck me as particularly problematic.

Currently, Commissioners receive official draft "meeting items" three weeks before they are considered at an Open Meeting. On the same date, the Chairman typically announces the tentative agenda. The announcement is often accompanied by a blog posting or fact sheet that selectively summarizes and promotes the items. However, the actual notices or orders are not made available to the public. Moreover, Commissioners are barred by rule from disclosing any additional information about the items. Only the Chairman and staff with the Chairman's written authorization may do so.

I've highlighted several problems with this approach. First, because the public is unable to obtain a complete picture of what is in a pending item, there is often confusion over what is at stake. While some favored parties may get special briefings from staff and other parties may accumulate select information, it is usually too late to make a difference. Moreover, the general public is not included at all.

Second, Commissioners meet with outside parties to discuss proposed items, but the current rules significantly diminish the value of these meetings. Because Commissioners are not allowed to discuss the details, we can't engage in a meaningful dialogue with affected parties, correct inaccurate information, or get feedback on our proposed edits. I am actually prohibited from discussing any changes that I may be seeking to the item as this could reveal information about the original text. For example, I believe that the Commission would have benefited tremendously if our recent 3.5 GHz item was made publicly available in advance. During its consideration, there was significant misunderstanding by outside parties over the Contained Access Facilities provisions, the proposed auction procedures for the Priority Access Licenses, and other aspects.

Third, the current process leaves items vulnerable to challenge. It is ironic that the main objection to publishing items in advance is that it would be harder to comply with the Administrative Procedure Act (APA), because we would have to respond to substantive feedback received about the draft text. But that is the very purpose of a rulemaking proceeding: to generate concrete suggestions about proposals to ensure that any rules are technically and legally sound. It is a feature, not a bug. I would suggest that it is the current process, which limits the ability of the public to provide thoughtful comments on what's actually being considered, that exposes our items to legal challenges.

Accordingly, I have suggested that FCC meeting items be posted on the FCC website at the same time they are circulated to the Commissioners, which is the approach taken in the draft legislation. Doing so shouldn't delay item consideration since there is a full week of sunshine to perfect the document pursuant to edits by Commissioners. And since that is the only draft that would be made available, I am also not persuaded by those that argue that we would be headed down a slippery slope when it comes to the Freedom of Information Act. The fact that we would disclose one version in one instance may make it harder, but by no means impossible, to justify withholding other versions in other instances.

In addition, while I have focused on Open Meeting items, I commend Representative Kinzinger in his draft legislation for examining the process for "circulation items" that are not voted on at meetings. Many of the same transparency concerns apply to these items, although the solutions may differ given that many circulation items do not have a natural voting deadline and there is no built-in quiet period to enable staff to review the record and finalize the item.

Delegated Authority

Even those who regularly follow FCC proceedings can find it difficult to keep track of all of the items the FCC releases at the Bureau or Office level. Imagine my surprise when I discovered that it is just as hard for a Commissioner inside the agency. Commissioners are not notified of the vast majority of items that are decided and issued on delegated authority. Like everyone else, we must read the Daily Digest and search the dockets and Federal Register.

For select items, a Bureau or Office may provide Commissioners with a 48-hour notice, 24-hour notice, or "courtesy heads up". But the practice is inconsistent across the Commission as these decisions are often made in an ad hoc manner. In some cases, there are memos or emails memorializing agreements, but they are not provided to new Commissioners unless they know to ask.

Moreover, delegation to the staff seems to be increasing, particularly for controversial items. In those cases, it is common to send all remaining issues to the staff for resolution rather than deal with the possibility of further dissents. Even worse, these decisions endure, meaning new Commissioners are bound by delegations of prior Commissions. In fact, they may not even be aware that they exist because there is no master list or inventory of agency delegations.

I understand that there are some routine matters that can and should be handled at the Bureau level, such as certain equipment authorizations and uncontested licensing actions. However, we are seeing actual rulemaking functions assigned to staff. For example, in the December E-rate order, the Bureau was delegated authority to, among other things, determine what are reasonably comparable broadband offerings. That is a step too far. Some have argued that delegating issues to staff will expedite proceedings, but I stand ready to act quickly on all items circulated to me for consideration. Typically, if

I have not voted on an item, it is because we are waiting on answers to questions or on others to complete their work.

To remedy these problems, I suggest that the Commission needs to reassess, in a holistic manner, what items or proceedings should be done at the Commission level versus the Bureau level, and the default should be Commission level. For the narrow set of decisions that will be released at the Bureau level, Commissioners should be notified no later than 48 hours in advance, as provided for in the draft legislation. Moreover, in some recent instances, the leadership has refused to elevate a delegated item to the full Commission at the request of two Commissioners. Allowing Commissioners to bring a Bureau-level item to the full Commission would serve as an essential check and balance on delegated authority and should be codified immediately.

Editorial Privileges and Publication of Voted Items

I have also raised concerns about "editorial privileges", which is the uncodified practice of allowing staff to make changes to an item after the Commission votes on the text at a meeting. In the past, these post-adoption changes were limited to updating citations and correcting typos. In Congressional terms, these would have been known as technical and conforming edits.

At the FCC, however, staff can do substantial, substantive editing post adoption. The changes include adding lengthy responses to ex parte arguments that had not been incorporated into the draft prior to the vote. Indeed, there are no limits on what may be changed, so staff can make fundamental revisions well after the votes have been cast. In my view, if the item is not ready in time for the vote, then the Commission should simply delay the vote by a month or two rather than vote on an unfinished product.

In addition, staff invoke editorial privileges to further rebut dissenting Commissioners' statements. This isn't necessary. Commissioners that disagree with an item in whole or in part typically make their concerns known well in advance, so there should be time to respond before the vote. Instead, I've witnessed the vicious cycle of revising drafts to respond to statements and revising statements to respond to drafts, well after a vote has already taken place. To highlight just a couple of the many examples, this happened last year on both the April and December Connect America Fund items, and it impacted Commissioners from both parties.

Therefore, I have suggested that post-adoption changes be limited to those that are absolutely necessary to comply with the APA. Moreover, it should be the Commissioners, not staff, who propose such changes. And all Commissioners should be able to opine on those edits, not just those who voted to approve or concur to the original text as is the case today.

Publishing the text of the official rules as voted on by the Commissioners on the day of the vote, as Representative Ellmers' draft legislation contemplates, is certainly an improvement. It wouldn't necessarily bar subsequent edits to the supporting documentation, but it might help limit unnecessary and problematic post-adoption revisions.

Pre-adoption Processes

The process leading up to a Commission vote is another source of concern. As described above, Commissioners receive draft meeting items three weeks in advance of an Open Meeting. That time is

intended to be used by the Eighth Floor to consider the proposed items, engage with stakeholders, work with other Offices, and suggest edits to the items.

Unfortunately, it has become common practice for Bureau and Office staff to continue to make edits to items throughout the three week period. Again, these aren't technical or conforming edits, but substantive changes. In fact, our good staff sometimes use the time to cut deals with outside parties. And these negotiations and revisions can and do happen right up until hours before the vote. For instance, leading up to the vote on the location accuracy order, negotiations with industry continued until the very last minute. Although the industry compromise was better than what was in the circulated draft, these negotiations and industry input should have occurred before the item came to the Eighth Floor.

At times, Commissioners have been criticized for not engaging early enough in the process. I personally endeavor to read items and ask questions or provide feedback promptly. However, I would observe that it is hard to engage, and not a particularly productive use of time, when items are moving targets. On many occasions, I have read a very lengthy document within a day or two of circulation taking meticulous notes only to toss it all out when I receive an entirely new document a week or two later that is also not the final word on the matter.

Although there is a process – using official email chains – to record edits to items, staff revisions are not documented or described on these chains in any meaningful way. Therefore, Commissioners are left to wonder why changes were made and at whose behest. In the past, I understand that staff was required to attribute every substantive edit to a Commissioner office, or to a Bureau or Office. That is no longer the practice.

Therefore, I have suggested several improvements. First, the circulation date should mean that a document has transferred to the Commissioners for their consideration. Staff should not be allowed negotiate with outside parties or revise the document without advance notice to all Commissioners and the consent of at least three offices. Additionally, if further negotiations are necessary, and they may be in rare instances, an item can always be delayed to a later meeting. Second, all changes must be detailed on the official email chain, including the reasoning and justifications for the proposed revisions. Third, a final version reflecting only the edits set forth on the chain must be provided to the Commissioner offices no later than 24 hours before the start of an Open Meeting.

<u>Testimony Provided by Outside Witnesses at Commission Open Meetings</u>

Commission meetings used to be working sessions, but over time they have become more theater-like since the outcome is determined before the meeting actually begins. Recently, outside witnesses have been invited to speak at Open Meetings, particularly when controversial items will be voted, solely to further the messaging efforts for the items.

I suggest that if the Commission is interested in hearing from outside parties, it could designate certain meetings for taking testimony, akin to hearings. These meetings could supplement, not supplant, agenda meetings where the Commission considers and votes on meeting items. That way we could separate the hearing portion from the Open Meeting.

Assuming the practice of inviting witnesses continues, however, I have recommended changes to ensure that the process is more balanced and fair. Minority Commissioners, whoever they are on any given

issue, should be able to invite their own witnesses to provide a countervailing viewpoint. That means that all Commissioners should be informed well in advance if witnesses will be invited so that they have time to invite their own. Moreover, all Commissioners should receive testimony from all witnesses at least 48 hours in advance so that they know what to expect and prepare any questions. Indeed, anyone at the presentation table, both guests – regardless of whether they are speaking or not – and Commission staff, should be prepared to answer questions from Commissioners.

Role of FCC Advisory Committees

Designed correctly, Advisory Committees can provide the Commission with valuable technical expertise and practical insights. It makes abundant sense to hear from the actual people that develop, deploy, or use the technologies that fall within the Commission's purview. That is why I always encourage interested parties to participate in our proceedings.

Unfortunately, several flaws in the current structure diminish the value of FCC Advisory Committees. In particular, I am concerned that participation on Advisory Committees is not entirely voluntary – membership is the only way to try to protect your interests – and that Commission leadership has undue influence over the agenda and recommendations of the Committees. As a result, Advisory Committees frequently seem compelled to support an outcome that is preordained by Commission leadership only to see their acquiescence used as an excuse to further regulate the participants.

Instead, consistent with the FCC's own internal directive, Advisory Committees must be able to offer independent, unbiased recommendations on the issues they consider. Membership should reflect a range of viewpoints and all participants should be empowered to speak openly without fear of reprisal. Moreover, Advisory Committees should be free to recommend that no regulatory action is required if that is their own considered conclusion.

Paperwork Reduction Act and Regulatory Flexibility Act Compliance

The Paperwork Reduction Act requires the FCC to seek OMB approval before asking entities to fill out forms, maintain records, or disclose information to others. The intent was to require agencies to carefully consider the need for additional information before collecting it, thereby minimizing burdens.

I was dismayed to learn the extent of the FCC's information collection efforts. Moreover, they do not appear to be well-coordinated across the agency and seem disproportionately costly. In fact, I have heard from small rural telephone companies that have to make close to 100 filings with the FCC each year. That's a significant amount of time and resources that is being diverted away from delivering service to consumers.

To put the problem into context, my staff compared the FCC's collections against other those of other federal agencies. According to OMB, the FCC has 414 active collections demanding 474,540,069 responses each year requiring a total of 83,941,428 hours to complete at a total cost of $827,267,851. That total cost is well above the cost figures of several other major agencies, as seen below.

Agency	**Total Cost of Active Information Collections**
Department of Education	$145,304
Department of Housing & Urban Development	$1,135,506
Department of Energy	$9,925,925

Department of the Interior	$118,230,881
Department of Transportation	$271,000,797
Department of Agriculture	$297,027,904
Department of Health & Human Services	$654,249,795
FCC	**$827,267,851**

While I support data driven decision making, I have to question how much of this cost is truly justified. I've observed that every new FCC policy seems to require a brand new data collection. The agency needs to complete a data review to determine which collections remain necessary, look at ways to streamline those collections, and eliminate those that are unnecessary.

In addition, the FCC does not adequately account for the effects of its rules and data collections on small businesses. The Regulatory Flexibility Act (RFA) requires federal agencies to review regulations for their impact on small businesses and consider less burdensome alternatives. In order after order, however, the FCC's analysis is plainly deficient. At most, the FCC makes a few token changes while reiterating the importance of applying the rules to all carriers. For example, the FCC recently applied Title II and the Net Neutrality rules to small broadband providers without any analysis or calculations of the burdens this would impose. Its only concession was to provide *temporary* relief from a few of the new transparency requirements. Wherever any person is on the overarching substance of that item, it would seem reasonable that small providers would have a more appropriately tailored structure to reflect their costs of operations and their influence in the marketplace.

At the same time that the FCC reviews its data collections, it should specifically analyze the impact on small businesses. Additionally, as the agency conducts rulemakings, small business concerns should be at the forefront, not an afterthought or a box to be checked with a minor tweak. In the RFA analysis that accompanies each item, the FCC should be able to point to meaningful adjustments that were made to reduce burdens.

Accounting for Enforcement Bureau's Assessed Penalties

The FCC's Enforcement Bureau has been making headlines lately for the sizeable penalties proposed against entities that apparently violated FCC rules. Given the attention paid to these proposed fines, I was surprised to discover that the FCC does not have a system in place to readily track whether and to what extent those penalties are eventually collected. The FCC needs to fix this disconnect.

To get the entire picture, the FCC would need to work with other agencies that are part of the collections process, namely the Departments of Justice and Treasury. Obtaining this information would have a number of benefits. First, it would assure the industry and the public that rule violations are taken seriously and dealt with to the fullest extent possible. Second, demonstrating that the FCC follows through on violations should have a deterrent effect on other would-be bad actors. Third, it could inform future enforcement actions, penalties, and settlements. If the agency is consistently under-collecting penalties from certain type of providers or for certain rule violations, it may need to change its approach.

Codify All FCC Procedures

To further increase transparency, the FCC should codify all of its procedures and practices. Today, a select few can be found in the Code of Federal Regulation, such as procedures for announcing and

conducting Open Meetings. Many more, including the processes for distributing, voting, and releasing items, are contained in an internal "Commissioner's Guide to the Agenda Process". And still others, such as editorial privileges, are not contained in any document whatsoever.

The Commission is accountable to the public and to Congress for its actions, and those actions should be understood by all. Interested parties should not have to guess about how the Commission processes items. Codifying the Commission's procedures will enable the Commission to give everyone the same awareness about our procedures and the ability to suggest improvements that can and should be made to benefit everyone involved.

In sum, I believe that the ideas and specific proposals provided above would improve the efficiency, transparency and accountability of the Commission. To be clear, I have additional areas to add to this list but I may need some more time to further develop potential solutions, and would be happy to provide more information as that occurs.