

Statement of FCC Chairman Tom Wheeler

**Before the
Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives**

**Hearing on
“FCC Reauthorization: Improving Commission Transparency”
April 30, 2015**

Introduction

Chairman Walden, Ranking Member Eshoo, Members of the Subcommittee, I appreciate this opportunity to join with my colleague Commissioner O’Rielly to provide a progress report on the Federal Communication Commission’s efforts to improve its internal processes and increase transparency. The American people expect the Commission - and all federal agencies - to carefully consider and decide matters in a fast, fair, and effective manner. Put more simply, the public expects government to work. When procedures gum up the works of government, they should be fixed. I’m pleased to report that, thanks to the Commission’s process reforms, the agency is more efficient, more transparent, and more engaged with the public. Most important, the agency is more productive, advancing multiple initiatives to spur innovation, investment, and economic growth, while protecting consumers.

When considering new process reforms, we ask if the change will improve our ability to protect consumers and the public interest, including by responding efficiently to businesses that

depend on us to decide matters efficiently. I have reviewed the legislative proposals at the center of this hearing, and have serious concerns that these proposals fail that test. They would create burden without concomitant benefit. They would single out the FCC, rather than work within the time-tested approach of the Administrative Procedure Act. In my judgment, they would hurt, not help, the Commission's work and mission. Rather than cut bureaucratic red tape, they would add new layers.

This is not to say that the Commission cannot do better. It can, and I am determined that it will. Finding the right balance between confidential deliberation and public debate can be difficult. The Commission must remain nimble and have the necessary flexibility so that we can get this delicate balance right and exercise our authorities as the conditions demand, not just for today but also for unknown circumstances that will arise in the future. I look forward to discussing how we can work together to further improve the agency's operations so we can better conduct the business of the people.

Commitment to Improving Processes and Transparency

What the FCC can accomplish flows from how we do business. That's why, since day one of my chairmanship, improving agency operations has been a top priority. One of my first acts in office was to charge a senior member of my staff with tackling process reform and providing me within 60 days with a report on opportunities and challenges at the Commission. We haven't let our foot off the gas since.

We undertook a series of efforts to create a leaner, more efficient, and more transparent organization, guided by nine working groups comprised of Commission staffers, and significant input from external stakeholders. Driving our initiative was a simple principle – make our agency faster and more effective and efficient for our constituents, whether it’s a consumer concerned about robocalls or a broadcaster renewing a license.

These efforts have delivered concrete results. Every Bureau and Office with responsibility for responding to requests from external petitioners and licenses developed a backlog reduction plan, which has resulted in a 44 percent reduction in our backlogged matters since last spring.

Last year, we closed more than 1,500 dockets that were dormant. In the Enforcement Bureau nearly 8,000 cases have closed. The Wireless Telecom Bureau resolved over 2,000 applications older than 6 months, and the Media Bureau reduced by 57% its pending applications for review.

Since transparency is the focus of today’s hearing, let me emphasize some of our efforts to make the Commission more open and accessible to consumers and businesses.

In early 2015, we launched a new online [Consumer Help Center](#), which has made the FCC more user-friendly, accessible, and transparent to consumers, as described in this [blog](#) from January. The new tool replaces the Commission's previous complaint system with an easier-to-use, more consumer-friendly portal for filing and monitoring complaints. In addition, the

information collected will be smoothly integrated with our policymaking and enforcement processes, and reports analyzing the aggregated data will regularly posted on our website.

We are making significant progress on the challenge of re-working our website, FCC.gov, to enhance searchability, navigability, and accessibility, as described in a [recent blog](#) from our CIO David Bray.

To better serve the entities we regulate, we've significantly expanded online filing so that now the vast majority of licenses and other filings can be submitted electronically. Later this spring, we will complete an update of our Electronic Comment Filing System (ECFS) to upgrade the capabilities and resiliency of our online system for collecting comments and enable the electronic processing of additional types of filings.

While we have made significant progress, I am not satisfied. There are important ways that the FCC can do a better job and Commissioner O'Rielly has been an important voice on these matters. Last month I told this Committee of my intention to launch a task force staffed by representatives of all five Commissioners to review our processes. We are studying how other agencies work. We are measuring the impact of reforms on consumers. We are considering how to better the ability of Commissioners to govern together.

We are moving ahead without legislation. In fact, a number of once hot topics, which were once the subject of legislative proposals, have been addressed through non-legislative process reforms, such as posting the Commission's budget on our website, establishing minimum comment periods, and including draft rules with Notices of Proposed Rulemaking. This track record and common sense teach us that internal changes are usefully left to the discretion and

execution of the agency, not blunt legislation. For these reasons, I believe that the Commission should be given the chance to continue to do its job, including the job of bettering how it conducts the business of the people.

Thanks to an agency-wide effort, we are advancing real, lasting process reform, with specific outcomes, metrics, and dates. We're changing the culture for the better, and it is already yielding dividends.

Effective Processes Driving Effective Policies

Process reform is not an end; it is a means to more effective policymaking. Over the past year-and-a-half, the Commission has been uniquely productive in delivering policies that will protect consumers, drive competition, and promote economic growth and innovation.

At Congress's direction, we just held the highest-earning spectrum auction in American history, which will free up airwaves to improve wireless connectivity across the country, fund the first nationwide public safety broadband network, and contribute more than \$20 billion to deficit reduction. This auction was made possible by unprecedented collaboration between the FCC, Congress, other agencies and industry, which made federal spectrum bands available for commercial access. At its April Open Meeting, the Commission unanimously adopted an Order to create a 150-megahertz band suitable for wireless broadband, including 100 megahertz previously unavailable for commercial use. And in 2016, the Commission will begin its historic Incentive Auction to free up beachfront spectrum for mobile use that will serve consumer

demand, promote innovation, and similarly spur more of the tremendous economic growth we have seen as a result of the mobile economy.

The Commission developed new internal guidelines for identifying and pursuing enforcement cases, resulting in a significant increase in civil penalties and restitutions in FY 2014 of over \$208 million, more than the previous four years combined.

The most obvious example of a policy that was improved because of an open and transparent process is the Commission's new Open Internet Order. The Open Internet rulemaking was one of the most open and expansive processes the FCC has ever run, contrary to what some commenters have claimed. I will discuss the Open Internet proceeding in more detail later, but, for now, I will note that the net result was an open process resulting in protections that will assure the rights of consumers and innovators to use the Internet without interference from gatekeepers, while preserving the economic underpinnings for competitive infrastructure investment.

Legislative Proposals

For as long as I can remember Congress has been telling the FCC to become less bureaucratic. As a former businessman, I have taken this admonition to heart. We want fair, open, and accessible proceedings at the FCC that produce results, rather than more paperwork, more filings, and more delays. I believe that the proposals before the committee today will create additional bureaucratic requirements that will be harmful, not helpful, to consumers and to

businesses that count on the FCC to establish rules or decide matters in a timely manner.

When considering today's legislation – or any – proposals to reform the FCC's processes, the most important fact to keep in mind is that the FCC, like every independent agency, must adhere to the requirements of the Administrative Procedure Act, which are intended to keep agency processes fair and open. Over the years, within the context of the APA, the Commission's practices have evolved to provide more transparency in our decision-making process. We seek and must consider public comment. Indeed, our expertise draws in part on those public comments.

At the same time, our practices recognize that ultimately there must be a decision. The APA permits us and our sister agencies to deliberate in private so that we may exchange ideas without being locked in by public positions. This is not a hypothetical concern. The Open Internet Order changed during the three-week period leading to the February Open Meeting as a result of specific Commissioner inputs. Indeed, at our April 2015 Open Meeting, both Commissioners Pai and O'Rielly specifically thanked me for incorporating their suggestions in the 3.5 GHz Order. These are just two examples of the collaboration possible only because we were able to exchange ideas openly and freely.

We act, of course, in public. Our orders are made public. Reconsideration petitions are considered in response to the publication of our orders. And, when it occurs, litigation is a very public process (followed of course by private judicial deliberation before decision).

As I have considered the question of process reform, I ask the following questions. Will proposed reform improve the quality of our decisions, or will it threaten to bog us down in process that prevents us from protecting consumers, including by undermining our ability to defend our decisions in court? Will it help the five members of the Commission deliberate in a flexible manner or will it freeze us into premature public positions that make decision making less collegial? Will it apply to administrative processes generally, as the APA does, or is it focused on one agency?

Creating agency-specific processes has serious and negative effects. It would add additional procedural steps and would slow the decision-making process, risking paralysis when the FCC needs to be nimble to keep up with a sector that operates at Internet speed.

It would create a perverse incentive for advocates and stakeholders to withhold important ideas until the end of the process, creating uncertainty and diminishing the robust exchange of ideas that has characterized our practices to date.

It would increase litigation and disputes as parties clash over interpretation of new procedures, and take years to clarify novel procedural requirements.

It would significantly complicate judicial review if every agency had its own rulemaking procedures. Courts rely on consistent APA requirements to hold agencies accountable.

It would create uncertainty, which would deter investment and hamper the Commission's ability to act rapidly.

Let's look at some of the adverse consequences of the proposals at the center of this hearing, beginning with Rep. Kinzinger's bill to require the FCC to publish the draft of an item before it is sent to Commissioners for a vote.

Releasing the text of a draft order in advance of a Commission vote effectively re-opens the comment period. That's because, under judicial precedent, the Commission must "respond in a reasoned manner to those comments that raise significant problems," *Sprint Corp. v. FCC*, 331 F.3d 952, 960 (D.C. Cir.2003). It won't take much for a legion of lawyers to pore over the text of an order and file comments arguing that new issues are raised by its paragraphs, sentences, words, perhaps even punctuation. This means the Commission would be faced with litigation risk unless it addressed the comments received on the draft order. This would result in the production of a new draft order, which in turn could lead to another public comment period – and another if a new draft order were released in response to subsequent public comment. The end result: the threat of a never-ending story that prevents the Commission from acting – or forces it to accept undue legal risk of reversal if it ever does. This potential for extreme delay undermines the Commission's efficiency without enhancing its expertise. And it does so at the cost of the consumers and businesses that rely on Commission decisions.

Because an unprecedented release of the draft rulemaking was proposed in the recent Open Internet decision, let's look at that proceeding as an example of why such a process is

redundant, unnecessary, and works against finding a solution. Historically, some NPRMs at the Commission simply asked questions. During my tenure I have insisted that when the Commission publishes a NPRM, it must contain a specific proposal, not just ask a list of questions; this was done in the Open Internet proceeding and allowed the public to focus in on and analyze a specific thought-process and fact-set, and challenge us they did like never before.

Over the course of 287 days of comments and reply comments, six public workshops, nearly 4 million formal submissions, and over 600 on-the-record *ex parte* presentations, the Commission heard from everyone and every point of view. As with every other proceeding, it became necessary to pull all the input together into a coherent proposal and share it with the Commissioners. This is when the Commissioners focus their insights and thoughts on the proposal, including specific language suggestions – and this work must, of necessity, be among the Commissioners and not with the public. The public has expressed itself, now it becomes time for the Commissioners to do their jobs, interpret that input, and develop a majority consensus.

To release the draft at this point would only step between the Commissioners and their responsibilities. The FCC is an expert agency. Staff and Commissioners draw upon their expertise, supplemented by the input received in the notice-and-comment process, to analyze an issue. Then, based on that record, the Commissioners work to reach a majority consensus. The process began with a proposal, the public commented on that proposal, and then it falls to the Commissioners to determine how to move forward. Releasing to the public a working document designed for an internal discussion to determine a majority position on the Commission is not a step towards either greater expertise or efficiency.

The confidentiality of the Commissioners' internal deliberations is a critical part of the process, long recognized by the law. So, for example, the Freedom of Information Act (FOIA) – an additional congressional command – contains a statutory exemption protecting the internal deliberative processes of an agency. As explained by the Department of Justice in its Guide to the Freedom of Information Act:

. . . the general purpose of [the deliberative process privilege] . . . is to “prevent injury to the quality of agency decisions.” Specifically, three policy purposes consistently have been held to constitute the bases for this privilege: (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.

In other words, allowing the Commission to engage in frank, non-public discussions improves the decision-making process, just as receiving public comments boosts the Commission's expertise.

As Commissioner Clyburn said at recent Senate hearing, “There is a deliberative process that takes place among us, and I would love for that to continue. I am able to speak in an unbridled fashion. One of the things I'm worried about in terms of releasing things prematurely is that would be compromised. If I have a question or concern or want to get some feedback, I would not like for that to necessarily get out before I come to terms with the exchanges.”

Consider what would have happened to the Wireless Infrastructure Order that the Commission adopted unanimously in October 2014 had this process been in place. The lawyers (representing localities opposed to efforts to streamline municipal processes that had been thwarting wireless infrastructure deployment) would have mined this proposal for the opportunity to raise new issues that would require it to be re-written and then, again, made public. The result would have been the delay of an order intended to enable wireless carriers to more rapidly deploy their wireless networks and provide better service to consumers.

In the end, this isn't about the Commission and the new burdens it would place on us, this is about those who rely on us and how they would be impaired. The agency is constantly criticized by regulated entities for taking too much time to reach decisions. Some of that is justified, but it bears recognizing that their sense of urgency comes from the fact that many of them operate in a rapidly changing environment. Delay is only in the interest of those benefitting from the status quo.

Imagine if the text of the Media Ownership Order or the Declaratory Ruling making DSL services subject to Title I (both adopted by the Commission in 2005) had been released to the public before the Commission had finished deliberating. The public interest groups that appealed the order would have had the opportunity to hold them up for months if not longer. Similarly, companies or trade associations strongly opposed to pro-consumer Commission actions such as the elimination of the sports black-out rule (September 2014) surely would have been seized upon by advocates for the non-prevailing position.

But the problems continue. The draft legislation would apply to every kind of action the Commission might take, including adjudications and enforcement actions. Adjudications are critical to the resolution of specific controversies and enforcement actions, in particular, contain serious allegations against companies. Corporate or individual reputations could be sullied on the basis of claims that have yet to be adopted by the Commission – and may never be.

Second, Representative Latta's bill would require pre-decisional notification and description of items decided on delegated authority. The proposal suggests that there is something inherently wrong with the process, that it is some rogue activity that needs to be called out. In fact it is quite the opposite; a thoughtful measure that ensures the Commission is quick and responsive.

The reality of delegated authority is that the delegation is the implementation of a decision of the Commission and any decision on delegated authority is always appealable to the Commission. Moreover, the Commission can change a delegation; the Commission's rules specifically provide that "[t]he Commission, by vote of the majority of the members then holding office, may delegate its functions either by rule or by order, and may at any time amend, modify or rescind any such rule or order." (0.201(d)). In sum, Bureaus have delegated authority because a vote of the full Commission gave it to them. It is always reviewable by the full Commission. It is not a bureaucratic frolic and detour.

Last year, there were over 950,000 delegated items issued by the Commission. The vast majority included routine wireless, radio and broadcast licensing and transfers. A notification of

the intent to decide these matters already exists. Either the Commission has specifically delegated authority to each of the relevant bureaus and offices to decide matters that do not raise new or novel issues, or the Commission in its orders has made specific delegations to the bureaus to decide certain substantive issues.

What is the practical effect of this proposal? It could delay Commission decisions by adding more time to the process when items are ready, and by creating an incentive for strategic behavior, such as saving significant arguments until very late in the process. It also raises the same risk noted above of last-minute comments and arguments that may require revisions, delay, re-notice, and so forth. This would severely hamper businesses and consumers trying to move their issues through the agency. Consider, for instance, a contested broadcast license renewal. These are normally issued on delegated authority after an investigation of the facts. When the delegated decision is announced, the question is resolved. To publish notice of an intent to announce would be like sending up a flare signaling all opponents to descend upon the Commission. No matter what the mechanism, delay is especially costly in an environment as dynamic as ours today. Now, perhaps that is the goal of the bill, but I hope not.

As I have said, I respect Commissioner O’Rielly’s proposals to improve our processes. But I disagree with his view of delegated authority. He proposes that each Commissioner be able to require that a delegated item be put to the full Commission for a vote. If a majority of the Commissioners is unhappy with what a bureau does on delegated authority, then it can initiate a review on the Commission’s own motion to reject it. Consider how that would work in practice. In the Open Internet Order, from which Commissioner O’Rielly dissented, the full Commission

expressly voted to delegate to the Consumer and Governmental Affairs Bureau the power to define a small-business carve-out from the new enhanced transparency requirements, after consulting with our Consumer Advisory Committee. The Commission fixed a deadline later this year for action because we determined that it is important to avoid unnecessary burden on small businesses. Under Commissioner O’Rielly’s proposal, a single Commissioner could move an already decided matter back to the Commission for another vote. To me, that sounds like a veto, not majority rule, and it would not better our processes nor improve our efficiency. I believe that the effect of limiting our use of delegated authority, either directly or indirectly, would be to force re-litigation at the expense of efficient and speedy implementation of a Commission vote.

The third proposal, by Rep. Ellmers, would require the FCC to post rules adopted or repealed on its website within 24 hours. I can assure you that this is what we try to do. During my term as chairman 73 percent of the rules have been published within one business day or less. Eighty-six percent have been published within two business days. In those instances when our rules are not available the following business day, it usually reflects late negotiations among Commissioners, and the Commission staff are still drafting the exact text to implement the agreement.

Items are sent to the Commissioners three weeks in advance of a vote. The Chairman’s office and the staff are ready to respond to Commissioners at that point. I understand that items are often complex and there are multiple items that must be considered. The result of this is that, especially on major items, Commissioner comments may not be received until the night before the item is to be voted on. Make no mistake about it, every Commissioner has the right to work

right up until the Commission meeting – but, when this happens, the necessary finishing detail work often can't be completed by staff quickly.

In addition, publishing the actual rules themselves, without the explanatory text and rationale that surrounds them, would be confusing and potentially misleading.

The problem is not that there is not resolve to publish an item within 24 hours, but rather that you can't make that target if changes are being made by Commissioners hours or moments before the item is called for a vote.

One barrier to better collaboration is the current so-called Sunshine Act that prevents more than two Commissioners from discussing Commission business outside of a public meeting. Though perhaps well-intentioned this prohibition prevents informal discussion and efficient negotiation among Commissioners. Modernizing this outdated law is reform that could make a real difference. I join many former FCC Commissioners from both sides of aisle, including Copps and McDowell, in hoping that Congress might move forward on this issue for all independent agencies.

Conclusion

The FCC has well-established processes that have served it well through many Administrations, which are firmly grounded in the APA, like all other administrative agencies.

Within the context of the APA, the FCC's practices have evolved under both Democrats and Republicans to provide significant transparency in our decision-making process.

I've been supportive of increased transparency along with other internal process reforms from the day I took office. I welcome engagement with my fellow commissioners and Congress on this topic; we may not agree on all details, but I'm absolutely open to discussion.

But as we move forward with this discussion, I believe that legislation to create process requirements that apply only to the FCC, and depart from the framework of the APA, is the wrong way to go. If we start down this path, the inevitable consequence will be a whole new crop of procedural disputes that will tie the agency into knots. Lobbyists and litigators will have a field day. Consumer, investors and innovators will not. And the FCC's ability to carry out our substantive agenda to grow our networks, promote economic growth and protect consumers will be caught in a cycle of procedural gridlock and delay.

Thank you for this opportunity to testify on the importance of the FCC's efforts to improve transparency. Transparency is not just a word – it is a purpose, an ideal, a concept that ensures the people own the government and not the other way around. It is also a shared value, and I look forward to working with you to find common ground and answer any questions that you have about our efforts, successes, and future endeavors.