



The Committee on Energy and Commerce

Memorandum

July 8, 2013

To: Members and Staff, Subcommittee on Communications and Technology

From: Majority Committee Staff

Re: Hearing on “Improving FCC Process”

The Subcommittee on Communications and Technology will hold a hearing Thursday, July 11, 2013, at 10:30 a.m. in 2123 Rayburn House Office Building on “Improving FCC Process.” The hearing will discuss two draft bills. One panel of witnesses will testify:

1. Stuart M. Benjamin, Douglas B. Maggs Chair in Law and Associate Dean for Research, Duke Law
2. Larry Downes, Internet industry analyst and author, including *The FCC's Unstructured Role in Transaction Reviews*
3. Robert M. McDowell, former FCC Commissioner and Visiting Fellow, Hudson Institute
4. Randolph J. May, President, Free State Foundation
5. Richard J. Pierce Jr., Lyle T. Alverson Professor of Law, George Washington University Law School
6. James Bradford Ramsay, General Counsel, National Association of Regulatory Utility Commissioners

I. Overview

The communications marketplace is one of this country’s most vibrant sectors. Poor process at the FCC, however, can produce flawed decisions and chill that vibrancy, particularly in this economy. Although former Chairman Genachowski made progress in improving process, only statutory changes can ensure that best practices continue from one administration to the next. That is why the subcommittee plans to reintroduce two bills that passed the House last Congress: H.R. 3309, the Federal Communications Commission Process Reform Act, and H.R. 3310, the Federal Communications Commission Consolidated Reporting Act. These bills aim to minimize the potential for procedural failings and abuse, and to improve agency transparency, efficiency, and accountability. The hearing will focus on discussion drafts of the two bills in anticipation of reintroduction.

The Federal Communications Process Reform Act passed the House in March 2012 by a 247-174 vote. The legislation was modeled on principles contained in the President’s January 2011 *Executive Order 13563—Improving Regulation and Regulatory Review*, which applies only to executive agencies and does not bind the Commission. To avoid micromanaging the agency, many of the provisions simply require the Commission to set its own process rules and then live by them. Among other things, the bill asks the FCC to examine the state of technology and the marketplace and conduct cost-benefit analyses before regulating; to publish the actual text of proposed rules; to afford commissioners, parties, and the public an adequate opportunity to review proposals; to publish its decisions promptly; and to evaluate whether adopted rules are meeting their purpose. It asks the FCC to create “shot clocks” so parties and the public have a sense of when issues will be resolved. To minimize the potential for abuse of transaction reviews, the bill would require any conditions to be narrowly tailored to transaction-specific harms and otherwise within the agency’s jurisdiction. To facilitate negotiation, the bill would reform the “Sunshine Act” to allow three or more commissioners to gather on a bipartisan basis.

The Federal Communications Consolidated Reporting Act passed the House in May 2012 on a voice vote. It seeks to relieve burdens on the agency and make reports more meaningful. By eliminating outdated studies and consolidating the ones that remain into a biennial release, the Commission will be more efficient and can provide more useful information. The draft also proposes a “State of the Industry” report, focused on the challenges and opportunities in the marketplace as well as the chairperson’s plan of action.

II. Section-by-Section

A. *H.R. ____, The Federal Communications Commission Process Reform Act* (changes since last Congress indicated in bold)

Section 1. Short Title.

Section 2. Adds section 13 to the Communications Act.

New Section 13(a)—Rulemaking Reforms. Requires the FCC to survey the marketplace before initiating a rulemaking, with exceptions for deregulatory rulemakings and for good cause. Requires Notices of Proposed Rulemaking to follow within three years of Notices of Inquiry to ensure they remain current, to include the specific text of proposed rules, and to provide at least 30 days each for comments and replies. Requires adopted rules to follow within three years of Notices of Proposed Rulemaking and be a “logical outgrowth” of the proposed rules. For economically significant rules—rules that will have an annual effect of \$100 million or more—the FCC must identify the problem it is trying to solve and make reasoned determinations that the benefits of the rule justify its costs **and that market forces and changes in technology are unlikely to resolve the issue within a reasonable amount of time.** Requires the FCC to develop performance measures for its program activities, defined as each FCC program listed in the federal budget as well as each program through which the FCC collects or distributes \$100 million or more.

New Section 13(b)—Ensuring Deliberation by Commissioners. Requires the FCC to outline for commissioners the options available to resolve a proceeding, to provide commissioners adequate time to deliberate pending orders, and to provide the public time to read proposed orders prior to open meetings.

New Section 13(c)—Nonpublic Collaborative Discussions. Allows a bipartisan majority of Commissioners to meet for collaborative discussions if they disclose such meetings within two business days and comply with Office of General Counsel oversight. Also applies to meetings of Federal-State Joint Boards.

New Section 13(d)—Initiation of Orders by Bipartisan Majority. Requires the FCC to allow a bipartisan majority of commissioners to direct staff to draft an order, to put such an order on the FCC's agenda, and to require that the FCC to vote on any order.

New section 13(e)—Review of Delegated Items. Requires the FCC to provide drafts of items to be issued on delegated authority to the commissioners at least four business days before adoption. Allows two or more commissioners to require such action to be taken, if at all, by the full commission.

New Section 13(f)—Public Review of Reports and Ex Partes. Requires the FCC to seek public comment on reports and to provide the public an opportunity to evaluate *ex parte* filings before the FCC may rely on them in their decision-making.

New Section 13(g)—Pending Item Publication. Requires the FCC to publish the status of open rulemakings as well as list the draft items the commissioners are currently considering.

New Section 13(h)—Shot Clocks. Requires the FCC to establish “shot clocks” for action in each type of proceeding it oversees.

New Section 13(i)—Release of Documents and Reports. Requires the FCC to establish a schedule for the release of its required reports and to release all orders within seven days of adoption. The FCC must report to Congress whenever it misses its own deadlines.

New Section 13(j)—Biannual Scorecard. Requires the FCC to report every six months regarding its progress in meeting its shot clocks as well as how it has used administrative law judges and independent studies.

New Section 13(k)—Transaction Review Standards. Preserves the FCC's ability to review transactions but requires conditions to be: (a) narrowly tailored to remedy harms that arise as a direct result of the transaction, (b) within the FCC's general authority, and (c), **related to harms unique to the transaction that are not present more broadly in industry.** Applies same requirements to “voluntary” commitments.

New Section 13(l)—Online Publication. Requires the FCC to publish the documents and reports specified in this section on the FCC's website.

New Section 13(m)—Federal Register Publication. Requires the FCC to publish the documents specified in the Federal Register no later than 45 days after release of the document or the day specified under any other provision of law.

New Section 13(n)—Consumer Complaint Database. Requires the FCC to put consumer complaint information in a publicly available, searchable database on its website.

New Section 13(o)—Form of Publication. Requires the FCC to publish documents specified in this section on its website.

New Section 13(p)—Transparency Relating to Performance in Meeting FOIA Requirements. Requires the FCC to take additional steps to inform the public about its performance in meeting the disclosure requirements of the Freedom of Information Act.

New Section 13 (q)—Definitions. Defines several terms used in the Act, including the terms “economically significant impact” and “program activity.”

Section 3. Prohibits the FCC from categorizing TCPA inquiries or complaints as wireline or wireless inquiries or complaints unless the complaint or inquiry originated from the conduct of a wireline or wireless carrier.

Section 4. Specifies that nothing in the Act alters the FCC’s ability to ensure the availability of communications systems to alert the public to dangerous weather conditions.

Section 5. Specifies that nothing in the Act alters the FCC’s ability to ensure the availability of communications systems for state and local first responders in times of emergency.

Section 6. Specifies that the Act does not alter the general framework established by the Administrative Procedures Act and related laws, except where it does so explicitly (*i.e.*, allowing deliberative collaboration among Commissioners and on the Federal-State Joint Boards).

B. H.R. ____, The Federal Communications Commission Consolidated Reporting Act

Section 1. Short Title.

Section 2. Adds section 14 to the Communications Act.

New Section 14(a)—Communications Marketplace Report. Requires the FCC to publish and submit to Congress a communications marketplace report synched to the two-year Congressional cycle.

New Section 14(b)—Contents. Requires the FCC to assess the state of competition in the communications marketplace, the state of deployment including the deployment of advanced telecommunications capability, and regulatory barriers to market entry and competitive expansion. Requires the FCC to identify the issues it plans to address over the next two years as a result of this assessment and to report on its progress on those issues previously identified.

New Section 14(c)—Special Considerations. Requires the FCC to consider intermodal, facilities-based, and Internet-based competition and to compile a list of geographic areas that are not served by any provider of advanced telecommunications capability. Empowers the FCC to consider international and demographic data in making its assessments. Requires the FCC to consider market entry barriers for small businesses.

Section 3. Consolidates into a Communications Marketplace Report the ORBIT Act Report, the Satellite Competition Report, the International Broadband Data Report, the Status of Competition in the Market for the Delivery of Video Programming Report, the Report on Cable Industry Prices, Triennial Report Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, the Section 706 Report, and the Report on the State of Competitive Market Conditions With Respect to Commercial Mobile Radio Services. Strikes from the Communications Act outdated or already repealed reports, including the Report on Competition between Wire Telephone and Wire Telegraph Providers, the 1997 Report on Spectrum Auctions, and several reports repealed by the Federal Reports Elimination and Sunset Act of 1995.

Section 4. Specifies that this Act does not alter the authority of the Commission in any way.

If you need more information, please call Neil Fried or Kelsey Guyselman at 5-2927.